Oh, then this is about constituent politics.

There's another constituent-oriented facet: Miguel Estrada is a successful immigrant, current front-runner to become the first Hispanic Supreme Court justice and an obvious role model—in short, a poster boy for Republican recruitment of minorities away from the one, true political faith.

This isn't about suspicions; Estrada is Democrats' worst nightmare from a partisan perspective.

From a personal perspective, Democrats who have worked with him in the Clinton administration have high praise. Seth Waxman, Clinton's solicitor general, called Estrada a ''model of professionalism.'' Former Vice President Al Gore's top legal adviser, Ron Klain, said Estrada is ''genuinely compassionate. Miguel is a person of outstanding character (and) tremendous intellect.''

During Judiciary Committee hearings in September, Estrada said: ''although we all have views on a number of subjects from A to Z, the first duty of a judge is to a put all that aside.''

That's good advice for a judge, and it's good advice for senators sitting in judgment of a nominee. Put aside pure partisan considerations; weight Estrada's qualifications, character and intellect; end the filibuster and put this nomination to a vote.

[From the Daily Lobo, Feb. 24, 2003]

ESTRADA NAYSAYERS HYPOCRITICAL

(By Scott Darnell)

Miguel Estrada isn't probably someone with an immense amount of name recognition—yet.

President Bush appointed him to an open seat on the U.S. Court of Appeals, District of Columbia Circuit on May 9, 2001; he immigrated to the United States from Honduras when he was 15 years old, graduated from Harvard Law School magna cum laude in 1986, has been a clerk for a Supreme Court justice, an assistant U.S. attorney and the assistant solicitor general, among other stints in private practice. He is supported by many national organizations, including the Hispanic Business Council, the Heritage Foundation, the Washington Legal Foundation and the Hispanic Business Roundtable.

Unfortunately, Estrada's confirmation has been delayed and prevented by many Democrats within the Senate, an action fueled by many leftist groups, organizations and lobbyists in America. Currently, Senate Democrats are planning to, or may actually be carrying out, an intense filibuster against Estrada's nomination; filibustering, or taking an issue to death, is definitely a method for lawmakers to prevent a policy or other initiative from ever coming to fruition—ending a filibuster is difficult, especially in our closely divided Senate, taking a whopping 60 votes.

The most unfortunate part of the Senate Democrats' obstruction on Capitol Hill lies in the fact that many high-ranking Senate Democrats have at one time condemned nomination filibusters quite harshly, leaving their intense efforts to carry out a filibuster today very hypocritical. For example, Patrick Leahy, the senior Democrat on the Judiciary Committee, said, from Congressional Record in 1998, that ''I have stated over and over again . . . that I would object and fight any filibuster on a judge, whether it is somebody I opposed or supported.''

Sen. Ted Kennedy said, from Congressional Record in 1995, that, ''Senators who feel strongly about the issue of fairness should vote for cloture, even if they intend to vote against the nomination itself. It is wrong to filibuster this nomination, and Senators who believe in fairness will not let a minority of the Senate deny [the nominee] his vote by the entire Senate.''

Finally, Sen. Barbara Boxer, from California said, from Congressional Record in 1995, that, ''The nominee deserves his day, and filibustering this nomination is keeping him form his day.''

It seems people can change quite a bit in only a matter of years.

But why are Senate Democrats and many leftist organizations so dead set against Estrada's nomination? The obvious answer lies in the fact that the court he is being nominated to is considered the second-highest court in the nation and often times though of as a stepping stone to the Supreme Court.

Secondly, Senate Democrats and organizations such as the NAACP or the AFL–CIO recognize Estrada's ethnicity—they recognize his heritage and the future he is making for himself—but let's face it, he's just the wrong type of minority. He's Hispanic and these politicians and organizations are all for the pro-active advancement of Hispanics, just not his type of Hispanic. The National Association for the Advancement of Colored People is now going to read ''The National Association for the Advancement of Colored People Who Believe in ONLY Leftist Principles and Ideology.''

Miguel Estrada will not, while in whatever courtroom he may preside over, pander to the interests of those who wish to establish and ingrain a persistent racial inequality in America, those who do not now carry out the legacies of past civil rights leaders, but instead bastardize those past efforts by forcing racial tension upon Americans to keep society at their beck and call while gaining personal notoriety, prestige and wealth.

If the Senate Democrats try to filibuster Estrada's nomination, they will be holding back debate and action on the immediate national and foreign issues affecting this country, such as creating and passing the appropriate economic stimulus package, among other important topics.

If the Senate feels that Estrada has committed a criminal or moral transgression at some point in his life that would injure the integrity and standing of his service as justice of one of our nation's highest courts, they should provide sufficient evidence to that end and take whatever measures necessary to disallow a moral or actual criminal from taking the bench. But, in this case, no such criminal or moral transgression can be seen, and the argument against his nomination is purely idealogical; a filibuster would represent a blatant obstruction of our political system and a disservice to the American people. So, as Democratic Sen. Barbara Boxer put it so succinctly a few years ago, ''Let the nominee have his day.''

Mr. DOMENICI. Mr. President, I repeat, it is one thing to delay; it is another thing to talk a lot; and it is yet another thing to attempt to get the issue that is before us and find a way around it and cloud the issue. That is all that is happening this morning with the discussion by the Democratic leadership, joined by certain Democratic Senators, when they argue that Republicans, by insisting that we vote on this nominee, are in some way failing to do justice to the economic problems that exist in our country.

I hope it doesn't take a lot more discussion for people to understand that is absolutely an untruth. It is an absolutely irrelevant argument. They can talk all they like about the economy and quit talking about Miguel Estrada and not one single thing will happen to benefit the American workers, not one thing.

We need to do something, and what we must do is decide whether we want the President's plan or some modification of it. The only way we can do that is to move with dispatch on the issues before us, those issues, in the way prescribed under our rules. There is no one suggesting we should throw away our rules and pass a plan tomorrow morning. Nobody is suggesting we do that.

In due course, in the matter of only a few weeks, we will be voting on whose plan should be adopted to help the American economy move forward.

I submit that the facts are overwhelming that the arguments against Miguel Estrada are not justified. Those arguments do not justify these delays.

I yield the floor.

RECESS

The PRESIDING OFFICER. Under the previous order, the hour of 12:30 p.m. having arrived, the Senate stands in recess until 2:30 p.m.

Thereupon, the Senate, at 12:30 p.m., recessed until 2:30 p.m. and reassembled when called to order by the Presiding Officer (Mr. VOINOVICH).

EXECUTIVE SESSION

NOMINATION OF MIGUEL A. ESTRADA, OF VIRGINIA, TO BE UNITED STATES CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA—Continued

The PRESIDING OFFICER. The majority leader.

Mr. FRIST. Mr. President, nearly 2 years ago, President George Bush nominated Miguel Estrada to serve on the U.S. Court of Appeals for the District of Columbia. When confirmed, he will be the first Hispanic member of this court. But the other side of the aisle has stalled. In fact, as I look back, we have been on this particular nomination since February 5. The other side has continued to stall this nomination, preventing something that is very simple, that I think the American people now understand, and that is a very simple up-or-down vote.

Every Senator in this body can decide either they support this nomination or they do not. Earlier today, attempts were made from the other side of the aisle to bring up other legislation with the call that it is time to move on, and I agree; it is time to move on. We have had hours and days and nights to debate and discuss the opportunity given to both sides of the aisle, and now it is time for us to vote on this nominee.

For nearly 2 years, the nomination of this man—now, remember, the American Bar Association has deemed him well qualified—has languished as some in this body have played politics with his future. They have consistently refused to give Miguel Estrada this very

simple right, I would argue, and that is an up-or-down vote.

In fact, the tactic, which is a filibuster—and the American people understand it is a filibuster—is something my colleagues on the other side of the aisle have said they would not use, filibustering of such a nominee. They have said that in the past. Yet they are filibustering this nomination on the floor of the Senate. We feel that is wrong. We will continue to fight for this up-or-down vote for this qualified nominee.

We came back from a recess yesterday. It is fascinating as we look around the country, even the newspapers, if we look at the top 57 newspapers—I do not think one can say the top 57, but to read what 57 major newspapers in this country are seeing and saying in terms of their editorials, indeed, 50 newspapers from 25 States and the District of Columbia have editorialized either in favor of the Estrada nomination and/or, I should say, against this filibuster of a nominee, in essence saying, yes, please give him an up-or-down vote.

It seems, because we are demanding a supermajority to become the standard, that the other side of the aisle is holding this Hispanic nominee, Miguel Estrada, to a higher standard than any other nominee to this court has ever been held. I think this is wrong. It is unreasonable, using a filibuster and forcing a judicial nominee to effectively gather 60 votes rather than 50 votes for confirmation. It sets a new and unreasonable precedent.

In the sense of fairness, I once again appeal to my colleagues on the other side of the aisle to give us that vote. Clearly, Senators have had adequate time to debate this nominee. I myself have come to this floor on five separate occasions to attempt to reach an agreement with the other side of the aisle for a time certain for a vote on the confirmation, and each time my Democratic colleagues object to giving him a simple up-or-down vote.

The two arguments I am hearing from the other side of the aisle are, one, they want unprecedented access to this confidential memoranda and, secondly, they need more information.

The first, to my mind, is a specious argument. It has been talked about again and again on the floor. It is almost a fig leaf because they know it cannot and should not be complied with.

I do want to address the second argument very briefly, not so much in substance but in terms of how we can bring this matter to a conclusion for the American people and for this nominee, so we can get to an up-or-down vote, and that is if they really feel there are specific questions that have not been answered, to reach out and figure some reasonable way to get the information to those questions. Again, outside of the rhetoric that flows back and forth and outside the heat of the argument, in the spirit of working together, I do want to suggest we work together on both sides of the aisle—and I would be happy to do it with the Democratic leader or his representative—toward putting together a reasonable list of questions that Members may wish to pose to Miguel Estrada. I would hope that once we agree upon the questions, submit them, and get the answers back, that process would allow us to come back to what I think we should be able to turn to immediately, but with the filibuster we are unable to, and that is to have a vote this week on the nomination.

I am really talking more process at this point, with an appeal to the other side for us to put together questions to submit and, once we receive those answers, be able to have a vote this week. Thus, I ask unanimous consent that the vote on the confirmation of the nomination of Miguel Estrada occur at 9:30 on Friday, February 28.

Before the Chair puts the question, I would add, and I want to stress, that I will work toward getting answers to any reasonable list of questions that could be worked out on both sides of the aisle.

The PRESIDING OFFICER. Is there objection?

The Senator from Nevada.

Mr. REID. I ask the majority leader to modify his proposal in the following manner: I ask unanimous consent that after the Justice Department complies with the request for documents we have sought, namely the memoranda from the Solicitor's Office which were first requested on May of 2001, the nominee then appear before the Judiciary Committee to answer the questions which he failed to answer in his confirmation hearing and additional questions that may arise from receiving any such documents.

Mr. FRIST. Mr. President, I will not modify my unanimous consent request as spelled out.

Mr. REID. I object.

The PRESIDING OFFICER. The objection is heard.

The Senator from Texas.

Mrs. HUTCHISON. Mr. President, as we have just heard from our distinguished majority leader, the Senate has had the nomination of Miguel Estrada since May 9, 2001. This man has been waiting for confirmation for almost 2 years. This is the most qualified person who has never gotten a vote in the Senate. In fact, the American Bar Association rated Miguel Estrada unanimously well qualified, the highest possible rating. Never before have Senators filibustered such a nominee.

Mr. Estrada would be the first Hispanic to serve on the Nation's second most important Federal court, adding diversity to our judicial system. Miguel Estrada's nomination is supported by a number of Hispanic organizations, including the Hispanic National Bar Association, the League of United Latin American Citizens, and the U.S. Hispanic Chamber of Commerce. The Austin American Statesman wrote last Friday: If Democrats have something substantive to block Miguel Estrada's confirmation to the U.S. Court of Appeals for the District of Columbia, it is past time they share it.

Miguel Estrada's nomination was announced in May of 2001 and has been held hostage since by the Senate Democrats who have yet to clearly articulate their objections to him.

Mr. Estrada is widely regarded as one of the Nation's top appellate lawyers, having argued 15 cases before the Supreme Court of the United States. He is currently a partner in a Washington, DC, law firm and practices law. He is truly an American success story.

Miguel Estrada emigrated to the United States from Honduras at the age of 17, speaking very little English. He graduated magna cum laude from Harvard Law School and served as a law clerk to U.S. Supreme Court Justice Anthony Kennedy. He has been in the judicial system. He is an esteemed academic. He has a stellar record. Yet Miguel Estrada cannot get a vote on the floor of the Senate. He has been a highly respected Federal prosecutor in New York City. He served as Assistant Solicitor General under President George H.W. Bush for 1 year and under President Clinton for 4 years.

His nomination has broad bipartisan support, including support from high-ranking Clinton administration officials such as former Solicitor General Seth Waxman and Ron Klain, the former counselor to Vice President Al Gore.

Mr. Estrada has worked throughout his career while he has been in the public sector and the private sector to uphold our Constitution and preserve justice.

That we cannot get a vote on this qualified man is incredible. I am afraid it could be the beginning of a precedent that, in my opinion, is unconstitutional.

Our Founding Fathers understood the need to have three separate and equal branches of government so there would be checks and balances throughout our system. They gave to the President the right to appoint a Federal judiciary, a Federal judiciary that has lifelong appointments. They gave to the Senate the right of confirmation—advise and consent as it is called in the Constitution—that has always meant a majority vote. If a two-thirds vote has ever been required by the Constitution, it is specified. So we are talking a simple majority, a simple majority to confirm the nominees of the President. That is the check and the balance in the system.

What we see today is an amendment to the Constitution, but it has not gone through the process required under the Constitution where an amendment would get a two-thirds vote of both Houses of Congress and then it would go to the States to be passed. That is the requirement to change the Constitution of this country.

However, today we are changing the Constitution because we are, in essence, requiring 60 votes to break a filibuster in order to confirm this judge, Miguel Estrada. Why have we set a bar of 60 votes for this man? What is the thought process of the Democrats who are filibustering this appointment that they would substitute a 60-vote requirement for the constitutional provision that has always meant 51 votes or a majority of those present, a simple majority? And yet we are setting a new bar, a 60-vote bar, without going to the people, without going through the process of a constitutional amendment. This is not right. This man has been pending for 21 months.

We are now in the Chamber. He has come out of committee. We are in the Chamber trying to get a vote of a simple majority to put the first Hispanic on the DC Court of Appeals, a Hispanic who graduated with honors, magna cum laude, from Harvard Law School, with years of experience as one of the most highly esteemed appellate lawyers in America, and we cannot get a vote on Miguel Estrada.

Let me read some of the editorials that have been written about this nomination. On February 18, 2003, the Washington Post wrote:

The Senate has recessed without voting on the nomination of Miguel Estrada to the U.S. Court of Appeals for the D.C. Circuit. Because of a Democratic filibuster, it spent much of the week debating Mr. Estrada, and, at least for now, enough Democrats are holding together to prevent the full Senate from acting. The arguments against Mr. Estrada's confirmation range from the unpersuasive to the offensive. He lacks judicial experience, his critics say—though only three current members of the court had been judges before their nominations. He is too young—though he is about the same age as Judge Harry T. Edwards was when he was appointed and several years older than Kenneth W. Starr was when he was nominated. Mr. Estrada stonewalled the Judiciary Committee by refusing to answer questions—though his answers were similar in nature to those of previous nominees, including many nominated by Democratic presidents. The administration refused to turn over his Justice Department memos—though no reasonable Congress ought to be seeking such material, as a letter from all living former solicitors general attests. He is not a real Hispanic and, by the way, he was nominated only because he is Hispanic—two arguments as repugnant as they are incoherent. Underlying it all is the fact that Democrats don't want to put a conservative on the court.

Laurence H. Silberman, a senior judge on the court to which Mr. Estrada aspires to serve, recently observed that under the current standards being applied by the Senate, not one of his colleagues could predictably secure confirmation. He's right. To be sure, Republicans missed few opportunities to play politics with President Clinton's nominees. But the Estrada filibuster is a step beyond even those deplorable games. For Democrats demand, as a condition of a vote, answers to questions that no nominee should be forced to address—and that nominees have not previously been forced to address. If Mr. Estrada cannot get a vote, there will be no reason for Republicans to allow the next David S. Tatel—a distinguished liberal member of the court—to get one when a Democrat someday again picks judges. Yet the D.C. Circuit—and all courts, for that matter—would be all the poorer were it composed entirely of people whose views challenged nobody.

Nor is the problem just Mr. Estrada. John G. Roberts Jr., Mr. Bush's other nominee to the D.C. Circuit, has been waiting nearly two years for a Judiciary Committee vote. Nobody has raised a substantial argument against him. Indeed, Mr. Roberts is among the most highly regarded appellate lawyers in the city. Yet on Thursday, Democrats invoked a procedural rule to block a committee vote anyway—just for good measure. It's long past time to stop these games and vote.

Mr. President, the Washington Post has shown the fallacy of all the arguments that have been thrown out there against Mr. Estrada: Well, he did not answer questions; well, he is too young; well, he is not Hispanic enough.

Give me a break. This is ridiculous. This is a man who is one of the most highly qualified appellate lawyers in America, who has a stellar academic record, who has a stellar reputation in public life, who has strong bipartisan support, and who cannot get a vote in the Senate because he is being filibustered.

This just is not right. It is time we call this what it is. It is a filibuster. It is a change of the constitutional requirement for advice and consent from the Senate. It is a change of the Constitution without any procedure that is required to amend our Constitution. It is setting a new standard that Democrats and Republicans before have always agreed would never be done. When Democrats were in control, they did not filibuster nominees or they did not allow filibusters of nominees by Republicans, and Republicans are in control. And we are asking for the same courtesy, the same tradition, and, in fact, the same respect for the Constitution. The Constitution says advise and consent. When the Constitution requires more than a 51-vote margin or a simple majority, it so states. That is not the case in confirmation of judges, and it has not happened before on a partisan basis. There was one bipartisan filibuster. There has never been a partisan filibuster before.

There is no controversy about this nominee. There have been controversies before—controversies where you could legitimately see a difference in qualifications or in background issues or in experience issues. None of that applies to this nominee.

I think it is time the Democrats state if there are real objections. For instance, if there are more questions to be answered, have another hearing, or submit the questions in writing and let Miguel Estrada have a chance to answer these questions. Miguel Estrada has offered to go and visit with many Democrats who have not found the time to be able to see him. Yet we can't get a vote in the Senate on this distinguished nominee.

Let me read an article by Rick Martinez from the Raleigh News & Observer:

Once again, a minority is being denied a vote. Democrats in the U.S. Senate have threatened a filibuster to block the confirmation of Hispanic Miguel Estrada, nominated by President Bush to the federal Court of Appeals for the D.C. circuit.

If Estrada were applying to the University of Michigan law school, Democrats, it seems, would support giving him 20 points just for being Hispanic. Given the party's unqualified support of affirmative action, why shouldn't it ante up to 10 or 15 Senate votes for confirmation simply because of his ethnicity? Goodness knows that Hispanics, now the nation's largest ethnic group, are largely unrepresented in the federal judiciary.

Democrats counter that their opposition is based on Estrada's views and qualifications. If so, at what point along the ladder from law student to the federal bench is race no longer relevant?

For Democrats, it was when Estrada stepped on a rung they viewed as conservative. Once that ideological line was crossed, all the benefits of affirmative action—increased representation, diversity of social experience, providing an example for minority youth—no longer applied to the Honduran-born lawyer.

Mr. Martinez says:

The whole Estrada tiff is the latest warning to Hispanics that racial politics is about power, not equality. Hispanics have been given fair warning that those who wander off their pre-assigned ideological plantation will pay a heavy price. Ethnic hit man, Rep. Bob Menendez, a New Jersey Democrat, unleashed an ugly personal attack on Estrada by questioning his Hispanic heritage. To date not one Democratic leader has taken Menendez to task for his unwarranted remarks. That they came from a man with a Latin surname doesn't make them any more legitimate or any less offensive than if they came from Sen. Trent Lott.

Democrats, write this down. We Hispanics don't all look alike, we don't all think alike, and God has yet to appoint Menendez to pass judgment on our ethnicity. Ideology has never been an ethnic prerequisite, and it shouldn't be for one on the federal bench either.

There are approximately 50 editorials written throughout the country about the qualifications of this man. This one written by Rick Martinez in Raleigh, NC, basically says there is a different standard for Hispanics—that Hispanics are not a monolith and they shouldn't be judged as a monolith. In fact, Miguel Estrada is one of the most qualified people—not one of the most qualified Hispanics, one of the most qualified people who—have ever been nominated for an appellate court in our country. He has the experience. He has the background. He has the academic credentials. And he has a reputation that is sterling. Yet we can't get a vote on Miguel Estrada.

I hope those who are refusing to allow a vote on Miguel Estrada will listen to the League of United Latin American Citizens—LULAC—which has come out strongly for this qualified man and that does not really understand why there is a different standard being set for him than is being set for other appellate court nominees.

I urge my colleagues to listen to the Hispanic National Bar Association president, who represents 25,000 Hispanic American lawyers in the United States, endorsing Mr. Estrada, the National Association of Small Disadvantaged Businesses, which came out in

strong support of Mr. Estrada, and a bipartisan group of 14 former colleagues in the Office of the Solicitor General at the U.S. Department of Justice who have come out foursquare for Miguel Estrada.

There is no legitimate reason being stated not to give Miguel Estrada a vote. To say that he didn't answer questions, if legitimate—if they would ask him questions and let him answer them, but they haven't. Saying he is too young is ridiculous; saying he is not Hispanic when he came to our country from Honduras at the age of 17 speaking little English—and he wanted a part of the American dream. But he didn't want it given to him; he wanted to earn it.

He worked his way into Columbia University and was a Phi Beta Kappa. He worked his way into Harvard Law School and graduated magna cum laude. He worked to get a partnership with a major law firm after being a Supreme Court Justice clerk which is reserved for only the best graduates of law schools in our country.

This man deserves a vote. He deserves the respect of the Constitution, and he is not getting it as we speak today. The Constitution says advise and consent. The Constitution says a majority—not 60 votes out of 100 but a simple majority. It is what has always been required for the President's nominees. That is the check and balance in our system.

I hope the Senate will do the right thing. If there are legitimate questions, raise them. Let Mr. Estrada answer them. But this man deserves a vote, and the Constitution deserves respect and adherence by this body.

Thank you, Mr. President. I yield the floor.

The PRESIDING OFFICER (Mr. CRAPO). The Senator from Georgia.

Mr. CHAMBLISS. Mr. President, I ask for permission to speak on behalf of Miguel Estrada.

The PRESIDING OFFICER. The Senator is recognized.

Mr. CHAMBLISS. Mr. President, I am still new to this body having been here less than 2 months at this point in my career in the Senate. After spending 8 years in the House of Representatives, I am still feeling my way through with respect to finding the microphone, and things like that.

I am somewhat at a loss when it comes to the process through which we are now going. It is totally unlike any type of process that I experienced in the House of Representatives because we don't confirm judges anywhere except in the Senate. I spent 26 years as a lawyer before being elected to the House of Representatives. In my 26 years as a lawyer, I tried hundreds of cases, and on appeals dozens and dozens of cases, and I had a number of opportunities to appear before both trial judges and appellate judges, on a variety of different issues.

At any one moment before an appellate court, you can pretty well look at a judge and tell whether or not that judge has done his homework on your issue. You have a sense of whether or not he has the intellect to interpret the issue and be very responsive to your argument. And if you ever find a judge who is not responsive, you can check his background, and you may find out that maybe he did not have the intellect to follow the course of your argument.

So when I look at the background of Miguel Estrada and try to decide whether or not, were I to appear as a lawyer before him, he would be the type of individual to whom I could make an argument and have him interpret that argument, even though it is on a very complex issue, I believe he would be. I have to tell you, his is one of the most unusual profiles I have ever seen of any member of the bar, much less any potential member of the bench.

It is unusual not just because his is a true American dream story. It is unusual because this man, as a practicing lawyer in public service and in the private sector, has distinguished himself above all other lawyers with whom he has ever been associated.

He is a man who has distinguished himself by coming to the United States, not speaking much, if any, English, and not only attending major universities, but graduating from those universities with high honors: from Columbia University with an undergraduate degree, and Harvard Law School with a law degree.

At Harvard Law School he was a member of the editorial board of the Law Review. And those of us who went to law school know there are only a few Law Review editorial board members. I can still remember in my law school class those who were members of the law review. Out of my class, of the 200 who started in law school, there were—I think about five of them—who were members of the Law Review. So it is a very distinct intellectual group of students who make the Law Review. And the editors of the Law Review are the elite of those very few who are designated with law review status.

The intellectual background of this man is unquestioned. He does have the capability of interpreting and deciphering any complex issue that might be presented to him as a member of the appellate court bench.

So when I think about, again, appearing before a man with his type of background, to argue a complex case, I think it would be wonderful to know you have somebody with the qualifications and the capability of Miguel Estrada to really listen to your argument and make the kind of decision every lawyer wants to have made on his or her particular case.

One thing that confuses me about Miguel Estrada's nomination is, I was told while I was in law school that I should join the American Bar Association as a student. And I did. I was a very active member of the American Bar Association in my small, rural community in Georgia for all of the 26 years I practiced law.

The American Bar Association is a very well respected, very highly recognized peer group within our profession. The American Bar Association was asked to review Mr. Estrada, as they review every other judicial nominee, and to make a recommendation to this body as to whether or not he is qualified to be confirmed by this body to the District of Columbia Circuit Court. They came back and said: Not only is he qualified, not only does he possess the academic and intellectual and legal background to serve on the Circuit Court for the District of Columbia, but he is well qualified. We are giving him the highest recommendation that lawyers can give to a lawyer who seeks confirmation to any court.

As a member of the Judiciary Committee, I have already seen that we have some judges who come through the committee who do not receive the highest recommendation from the American Bar Association, but nevertheless get confirmed by this body. And they should, because everybody is not going to get that highest qualification recommendation from the American Bar Association.

But Mr. Estrada got the highest qualification from his peers—those men and women who practice law with him, who talked to other lawyers who practiced law with him, who know how he functions day in and day out in the practice of law, who know his temperament and his capabilities as well as his ability to serve in the capacity of an appellate court judge. And for that body to come forward and say, we are going to give him the highest recommendation possible is just another one of the assets he brings to this body from the standpoint of confirming his nomination.

I was not here when Mr. Estrada had his hearing before the Judiciary Committee. That took place in September of last year when the committee was controlled by the Democrats. At that point in time, from what I read in the record, Mr. Estrada appeared before the Judiciary Committee for a full day's hearing. Every member of the Judiciary Committee had the opportunity to ask Mr. Estrada any question they wanted to. And they did.

There has been some question about whether or not he was totally forthcoming in his answers, whether he gave complete responses to the questions that were asked of him. Well, in addition to having the opportunity to ask Mr. Estrada questions at the time of his hearing, whether Mr. LEAHY was chairman or now with Mr. HATCH as chairman, the members of the Judiciary Committee always have the opportunity to submit written questions in addition to those questions that are asked at the hearing.

If a Judiciary Committee member is not satisfied with answers to questions he or she asked, he or she simply has the right to come back and say, I want

you to go into further detail with respect to this particular issue, to tell me whatever it is I want to have answered. Only two members of the Judiciary Committee came forward and said: We have additional questions we want to ask. Those two were both Democrats. They had the right to do it. They did it. And I respect them for coming back with additional questions when they felt they did not get totally complete answers. The fact of the matter is, though, those questions were answered immediately by Mr. Estrada.

So for somebody to come forward now on the other side of the aisle and say, we do not think he fully answered our questions, where were they? Where were they at the time of the hearing? Why didn't they come forward after the hearing if they were not satisfied at the hearing and submit additional written questions?

To come to this body now and to say Mr. Estrada was not totally forthcoming at the time of the hearing just shows this particular nomination has dipped itself into the depths of political partisanship. And it is not right.

I am biased. I am a lawyer. I think I am a member of the greatest profession that exists in the United States of America. I think we have a great judicial system because even though a lot of people throw rocks at our system—and I myself even have criticized it from time to time—we have the best system in the world. We have the best system in the world because it works. And people of all walks and backgrounds have the opportunity to have their cases heard by a judge, whether it is Mr. Estrada or a magistrate court judge in Colquitt County, GA. People have the right to have their cases heard.

And now, for somebody to come forward and say, I asked this guy a question, and he did not really answer my question, therefore, I am going to vote against him, I think just throws another rock at our judicial system that should not be thrown.

Referring, again, to Mr. Estrada's qualifications being called into question, this is an issue that has been batted back and forth between political parties. I have listened to an extensive amount of the debate over the past 2 or 3 weeks, both as Presiding Officer as well as on and off the floor. I have listened to my colleagues on the other side of the aisle raise issues relative to Mr. Estrada. In talking about qualifications of anybody to go to the bench, particularly the circuit court versus the district court, you can look at an individual lawyer and say, this man or this woman has appeared before the highest court in the land, the Supreme Court, not once, not twice, not 3 times, but 15 times to argue cases, and he has distinguished himself very well in those 15 arguments. As we all know, sometimes you are on the winning side and sometimes you are on the losing side, but 10 out of the 15 times that Mr. Estrada has been to the U.S. Supreme Court, irrespective of whether he was on the appellate side, which is the losing side going in, or whether he was on the appellee's side, the winning side going in, he has prevailed at the end of the day. So for a guy to argue 15 times before the U.S. Supreme Court and to win 10 of them is a very distinguishable record.

The fact that he even argued cases before the Supreme Court very honestly puts him in a category of lawyers that is the most highly respected group of lawyers that exists in the United States today. There are just not many folks who have the opportunity to argue a case before the Supreme Court. Here we have a man who has argued 15 cases before them.

Another argument I have heard time and time again is that we should be able to see the memos that he submitted to his boss while he was assistant to the Solicitor General. Some believe we should be able to see what was in his mind from a legal perspective, and use those memos to try to determine whether or not he has the judicial qualifications and temperament to serve as a member of the DC Circuit Court of Appeals.

Let me tell you what that is like. As a practicing lawyer, if I have somebody come into my office and I interview them and take notes and I then take their case and go into my law library and do extensive research on the issue for my client to make sure that I am well prepared from a legal precedent standpoint and I then write a memorandum, which I have put in my file to make sure that at the appropriate time—when the case either comes to a hearing or I have an argument with opposing counsel—that memorandum is personal and privileged to me and my client.

What the Democrats have asked for is, to view the collateral memos that were prepared by Mr. Estrada for his boss, the Solicitor General, while he was working in the Clinton administration and while he was working in the Bush 41 administration. That is wrong. They should not ask for it in the first place, but the Justice Department is absolutely right in refusing to produce them. They should not produce those memos because those memos are personal. They are private. They are privileged.

Every lawyer in the country ought to be outraged that the Justice Department is even being asked for those memoranda to be presented to this body for review when they were prepared in a private setting, in a setting in which there was a lawyer-client relationship in existence. Those types of memos have never been allowed to be offered into court for proof of any issue, and they should not be required to be presented here in this body.

Speaking of politics being involved here, again, as a new Member of this body and a new member of the Judiciary Committee, I am having a little trouble understanding the politics of this issue. I could understand it if Mr. Estrada has been a lifelong Republican, had the tattoo of an elephant on him and was a known advocate or radical that held forth extreme positions. I could understand the politics involved in seeking to block this man by the folks on the other side of the aisle.

But that is not the case. Here we have a man who came to the United States speaking little or no English, a man who went to two of the finest schools in America not known for their conservative-leaning students or faculty, Columbia University and Harvard. I don't know where they lean, but they are certainly not conservative-leaning universities.

That is his background. He comes from an administration that was not a conservative-leaning administration, the Clinton administration. He worked for 4 years in that administration. He worked for the Solicitor General in the first Bush administration for a year and then the Clinton administration for 4 years. There is nothing to indicate that this man would have an off-the-wall conservative-leaning philosophy.

I do not understand the politics of somebody coming up and saying: Well, we think he may be too conservative or he may be radical.

Those kinds of statements were made within the Judiciary Committee, and there is simply no basis for them.

The fact is, every Solicitor General who lives today who has worked for any administration, whether it is Republican or Democratic, has come forward and signed a letter saying, No. 1, the privileged memoranda sought to be produced from the Justice Department should not be produced because they will compromise future administrations. They never should be produced. And No. 2, they recommend Mr. Estrada for confirmation by this body.

When somebody in that position makes a statement, it takes it totally out of the realm of politics and puts it in the realm of professionalism, which is where it ought to be. We ought to have good, quality, competent men and women going to the bench.

As a Member of the House of Representatives during the Clinton administration, I had a good friend who was nominated to the District Court for the Northern District of Georgia. She is a good lawyer. She was a really outstanding U.S. attorney. She is not a Republican, but I thought she ought to be put on the district court. She was, in fact, appointed, and she was confirmed by this body because she was a good lawyer. She was the type of person who ought to be on the bench.

The same thing holds true for Mr. Estrada. All you have to do is look at his record. It is pretty easy to tell that he is a good lawyer. When you talk to other lawyers about him, I promise you, in the legal profession, you know very quickly whether or not somebody is well respected and well thought of.

Mr. Estrada has the respect of his colleagues. We have searched high and

low. If anybody has anything negative to say about Mr. Estrada, it has come forward. Only one coworker who he worked with over the years has had anything negative to say about Mr. Estrada.

Do you know what is unusual about that? That same individual, who was his supervisor in the Office of Solicitor General during the Clinton years, gave him a rating on two different years. That review rating that was given to Mr. Estrada was ''outstanding'' by this particular individual who is now the only member of the Solicitor General's Office, or any other place where Mr. Estrada was employed, who has had anything whatsoever, to say in a negative capacity regarding Mr. Estrada.

So whether it is people he worked for, whether you look at his qualifications from an educational standpoint, vis-a-vis an intellectual standpoint, whether it is the Hispanic community that you look to for a recommendation on Mr. Estrada—everywhere you look, he gets nothing but the highest marks, the absolute highest marks.

One other area in which I think Mr. Estrada has really excelled is with respect to what we in the legal community refer to as pro bono work. Pro bono work is done different ways in different parts of the world. In my part of Georgia, a practicing lawyer does pro bono work when he or she takes appointed criminal cases usually. Occasionally, you will represent an individual in a civil matter and you don't get paid for it. That is what we talk about as a pro bono type case. Mr. Estrada has been very active in the world of pro bono service. In fact, he handled one case that was a death row inmate case, which is not the normal type of case that a lawyer of Mr. Estrada's background would handle. But he took the case and, obviously, he did the work necessary to fully, totally, and very professionally represent his client, because he spent almost 400 hours in research and preparation for representing this individual—a death row inmate's case.

For a man to spend 400 hours—I don't know what his billable rate is, but even at my billable rate in rural Georgia, that would have been an awful lot of money that Mr. Estrada sacrificed for the sake of making sure this death row inmate had more than adequate representation. In fact, with Mr. Estrada, the death row inmate was represented by an outstanding lawyer who had the capability—and I am absolutely certain he did—to do everything necessary to fully and totally represent his client.

Now, one final criticism of Mr. Estrada is that he has no judicial experience. Well, I don't buy this argument. In fact, I think, if anything, it may be to his advantage. Having judicial experience sometimes, I think, could be even a negative factor, although in a case where you had somebody as qualified as Mr. Estrada, it would not make any difference one way or the other. But you have an individual here who has legal experience. That is what is important. He has legal experience in being able to work on complex cases, and most of the time, cases that come before the circuit court are complex cases. Mr. Estrada has the ability to deal with those complex cases because he has handled them for years and years as a practicing attorney in the public and private sectors. He has the type of background that lends itself to being able to deal with those complex cases and make a rational, reasonable interpretation of the Constitution, which every judge is expected to do and which is exactly what Mr. Estrada said he would do at his hearing in September before the Judiciary Committee.

I close by saying there have been 57 newspaper editorials I have seen relative to the nomination of Mr. Estrada and the treatment of his nomination on the floor of the Senate. Of the 57 editorials that have appeared in newspapers all across America, 50 have been favorable toward Mr. Estrada. One of those editorials appeared in a newspaper in my home State, in Atlanta, GA. The Atlanta Journal-Constitution wrote an editorial—about 3 weeks ago now—that was complimentary to Mr. Estrada and critical of the Senate for not moving on his nomination.

Let me tell you, when it comes to politics, the Atlanta Journal-Constitution is not on one side most of the time; they are on one side all of the time. I have never received, in my political career, the endorsement of the Atlanta Journal-Constitution, except for the one time when I did not have an opponent and I guess they had to endorse me. To say that they are in any way leaning toward the conservative side on any issue would be outlandish. But even the Atlanta Journal-Constitution came out and said this is wrong.

This man is a good and decent man. He has the intellect and background to serve on the Circuit Court for the District of Columbia Court of Appeals, and he should be confirmed. That line has been repeated by newspapers in America day in and day out for the last several months.

The Augusta newspaper, also in my State, wrote a glowing editorial also recommending that this body confirm the nomination of Miguel Estrada to the U.S. Court of Appeals for the District of Columbia.

I think, without question, that the right arguments have been made in support of Mr. Estrada. Just in winding down—I see my friend from Nevada here, and I don't know whether he wants time or not—I want to say that, from the standpoint of support from the Hispanic community, there has been overwhelming support from every aspect of the Hispanic community. When you look at the League of United Latin American Citizens—that is what we call LULAC—which is the Nation's oldest and largest Hispanic civil rights organization, the president of that organization, Mr. Rick Dovalina, wrote a letter, and this is what he said about Mr. Estrada:

> On behalf of the League of United Latin American Citizens, the nation's oldest and largest Hispanic civil rights organization, I write to express our strong support for the confirmation of Mr. Miguel A. Estrada. . . . Few Hispanic attorneys have as strong educational credentials as Mr. Estrada who graduated magna cum laude and Phi Beta Kappa from Columbia and magna cum laude from Harvard Law School, where he was editor of the Harvard Law Review. He also served as a law clerk to the Honorable Anthony M. Kennedy in the U.S. Supreme Court, making him one of a handful of Hispanic attorneys to have had this opportunity. He is truly one of the rising stars in the Hispanic community and a role model for our youth.

The Hispanic National Bar Association president, Rafael A. Santiago, stated as follows:

> The Hispanic National Bar Association, national voice of over 25,000 Hispanic lawyers in the United States, issues its endorsement. . . . Mr. Estrada's confirmation will break new ground for Hispanics in the judiciary. The time has come to move on Mr. Estrada's nomination. I urge the Senate Committee on the Judiciary to schedule a hearing on Mr. Estrada's nomination and the U.S. Senate to bring this highly qualified nominee to a vote, said Rafael A. Santiago, of Hartford, Connecticut, National President of the Hispanic National Bar Association.

So this man has the qualifications. He has the educational background. He has the legal background. He has the intellect. He has the support of Democrats. He has the support of Republicans. He has the support of liberals. He has the support of conservatives. He has the support of the Hispanic community. The only support he is lacking to bring this nomination to a vote on the floor of the Senate is the support from our colleagues on the other side of the aisle.

Not allowing this nomination to come to the floor for a vote is not fair, it is not judicially just. It is not just in any way from an ethical, moral, or judicial standpoint.

Mr. Estrada's nomination has been debated back and forth now for, gosh, going on 3 weeks. I guess 3 weeks starting tomorrow—a total of 4 weeks. We were here 2 weeks, we were out 1 week, and now we are back. So I guess it is a total of 4 weeks. We have a lot of business that needs to be brought before this body. We have a jobs growth package that needs to be debated and passed that the President has put forth. We have the impending conflict with Iraq and the continuing war on terrorism that needs to be dealt with on the floor of this body. We need to move to other business.

We need the folks on the other side of the aisle to come forward and say: OK, we will give you a vote. We do not think he is qualified, but we are willing to give Mr. Estrada a vote. That is the right thing to do, that is the just thing to do, and that is the judicial thing to do. If they want to vote against him, vote against him, but if we want to vote for him, we ought to have the opportunity to vote for him. We ought

not require 60 votes. We ought to require 51 votes, as I think our Constitution requires, and we ought to bring the name of Miguel Estrada to the floor of the Senate and have a vote.

I thank the Chair.

The PRESIDING OFFICER. The Senator from Massachusetts.

Mr. REID. Mr. President, will the Senator from Massachusetts yield for a question?

Mr. KENNEDY. Yes, I will be glad to yield.

Mr. REID. Mr. President, the distinguished Senator from Georgia just stated that there is a lot of business this Senate has to do and that we should get off the Estrada nomination and get on to these other matters. The Senator from Massachusetts, I am sure, agrees with my friend from Georgia that we have a lot of business to do.

I know from having worked with the Senator from Massachusetts over the years—and I ask the Senator if he will acknowledge this—there is business we need to do that we have been prevented from doing. For example, something we have not heard a word about is the minimum wage. People in Nevada are desperate. We have a service industry. Sixty percent of the people in Nevada who receive the minimum wage are women; for 40 percent of those women, that is the only money they get for the families. That would be a good issue to take up—minimum wage—doesn't the Senator from Massachusetts agree?

Mr. KENNEDY. The Senator is entirely correct. I was listening to my new friend from Georgia talking about the business that needs to be done. As the Senator remembers very well, our leader, Senator DASCHLE, tried to bring before the Senate an economic stimulus program that would have provided assistance to working middle-income families. It would have provided assistance to small business. It would have provided funding for education and the programs for which the Governors, Republicans and Democrats alike, indicated support. It would have provided additional assistance to the States to meet their Medicaid challenges. I hope to get to that in a moment. And it would have permitted funding in transportation. This would have made an important difference in trying to restore our economy.

The Senator, as part of the leadership, is familiar with the fact that Senator DASCHLE was prepared to bring that up and start that debate, but there was objection from the other side.

The Senator brings up the issue of minimum wage, and he knows how strongly I feel about an increase in the minimum wage which Republicans have denied us the opportunity to have. As the Senator has pointed out, more than 60 percent of those who are minimum wage recipients are women. So this is a women's issue. Of the women who receive the minimum wage, a majority of them have children, so it is a children's issue. It is a women's issue and it is a children's issue. Since a great number of those who receive minimum wage are men and women of color, it is a civil rights issue. It is a women's issue, a children's issue, a civil rights issue, and, most of all, it is a fairness issue because most Americans think that if someone works 40 hours a week, 52 weeks of the year, they should not live in poverty.

The great majority of Americans feel that way. We want to put that before the Senate and Republicans refuse to let us have a vote on that issue. We have been battling that issue not just for 10 days, not just for 2 weeks, but we have been battling that issue for the last 5 years.

I agree with the Senator when he says we have been trying to get matters before the Senate. We could bring up minimum wage. I am quite prepared as the principal sponsor—it is not a complicated issue. We have debated that issue time in and time out, year in and year out. It is not a complicated issue. We ought to be able to have debate and an up-or-down vote on that issue.

I think of all these statements of let the majority have a ruling on this nomination. Does the Senator remember as I do when we voted on a prescription drug program and a majority in the Senate was for the proposal of Senator GRAHAM of Florida and Senator MILLER, of which I was proud to be a cosponsor? That would have provided a comprehensive prescription drug program for all who needed it in the United States. We had 52 Members, a clear majority, for a prescription drug program, the third leg of the Medicare stool on which our seniors rely: hospitalization, physician care, prescription drugs. We had the 52 votes, and do you think we were permitted to have a vote in the Senate? No, our Republicans objected to that. How short is their memory.

Mr. REID. Will the Senator yield for another question?

Mr. KENNEDY. I will be glad to yield.

Mr. REID. The Senator is aware that this extended debate deals with the job of one person, a man by the name of Miguel Estrada. It is not as if he is not working. Does the Senator agree he is partner in one of the most prestigious law firms in America and pulling down hundreds of thousands of dollars a year? I say to my friend from Massachusetts, should not the Senate be more concerned about the millions of people who are underemployed, the millions of people who are unemployed, the people who are lacking health care—44 million people with no health care—and many people who are underinsured? Should not the Senate be dealing with those people rather than one person who is employed making hundreds of thousands of dollars a year?

Mr. KENNEDY. Mr. President, I say to the Senator from Nevada, I think he makes the case. It is such a compelling, overwhelming, rational case he makes about what is happening across this country. I know it is true, when the Senator from Nevada speaks about those who are unemployed, those who are underemployed, he is speaking for the people of Massachusetts. That statement the Senator just made is of central concern to the families in my State who are seeing now the highest unemployment in some 10 years, and the prospects are difficult, as people look down the road.

It was not always this way. We have seen it was not. I ask my colleague and friend, so many on the other side throw up their hands and say: It is the economic cycles. Is it not true that the longest periods of economic growth and price stability have been under Democratic Presidents? We had it over the last 8 years under President Clinton. That was not an accident. The time before that was in the early 1960s under President Kennedy. The longest periods of economic growth, price stability, and full employment were under Democrats. That is the record. That is the history.

We want to get back to a sound economic policy. A sound economic policy means creating jobs and having price stability, and the Senator understands this very clearly. Our minority leader, Senator DASCHLE does, and that is what we hope to resume with an effective economic program that can make a difference to families across this country.

The Senator from Nevada being a leader in this body, I am interested in whether the Senator agrees with me that the people in his State, as well as mine—I know I speak for all of New England on this. People are concerned, deeply concerned, about their economic future and they are concerned, obviously, about their security, the dangers which all of us are familiar with in terms of terrorist activities. In my State, they are concerned about their sons and daughters, especially if they are in the Reserve or the National Guard. We now have the highest calling up of the Reserves and the Guard since World War II. Communities are particularly concerned because more often than not, people who are being called up are those who have also been trained as auxiliary firefighters, police officers, or first responders in the medical professions.

What I hear the Senator from Nevada saying is we should try to respond to these kinds of anxieties. The leaders have provided a program which has galvanized many of our Members—all of the Members on our side—and his point is that as leaders in our party we should be focused on that program.

I was listening to my friend from Georgia talking about the attitude of some Hispanic leaders. I have a letter from 15 past presidents of the Hispanic National Bar: We, the undersigned past presidents, write in strong opposition to the nomination of Miguel Estrada for a judge on the Circuit Court of Appeals for the District of Columbia. I

will later come back to the statement they made.

Despite the pressure from our Senate Republicans and the White House to abandon our principles and our obligations, the Senate Democrats intend to abide by our constitutional duty to provide advice and consent in the judicial confirmation process. The White House, however, continues to refuse to give us the information necessary for our consideration of the nomination of Miguel Estrada. The White House is asking the Senate to rubberstamp its judicial nominees when those nominees will have enormous power over the lives of the people we serve. If we confirm nominees to a lifetime appointment to the Federal bench without looking into their record, we would open the door for the White House to roll back civil rights, workers' rights, and important environmental protections, along with many other Federal rights we have worked so hard to develop.

The danger involving the DC Circuit is even greater, because that court has exclusive jurisdiction over so many issues that affect all Americans. Since the Supreme Court hears relatively few cases in these areas, the DC Circuit is often the court of last resort for individuals to obtain the justice they deserve. If Mr. Estrada is confirmed, he will be called upon to decide many of these cases. Often, individuals have been victimized unfairly and in a manner not envisioned by the Constitution. They have come to the Federal courts for protection and relief. In doing so, they have changed America. They have made this country a stronger, better, and fairer land. They helped America fulfill its promise of equal opportunity, equal rights, and equal justice under the law. They have given real meaning in people's lives to the great principles of the Constitution and the many laws Congress has enacted over the years to protect these basic rights.

When we consider the nomination of Mr. Estrada, we need to understand the crucial importance of these cases and how the rights of so many others can be decided by a single case. These cases would not necessarily have turned out the way they did if we did not have Federal judges who are acutely aware of the rights and the needs of the most vulnerable Americans, and how their rulings affect so many people's lives.

Would Mr. Estrada be such a judge? Would he have this strong sense of justice of the needs of people he would serve? We do not know because we have been prevented from learning about this nominee, and the White House is trying to keep it that way.

Our response is clear. We will not confirm Mr. Estrada unless we know what kind of jurist he would be. Our constitutional responsibility requires no less.

Let me describe a few of the landmark cases the judges of the DC Circuit have decided. In Barnes v. Costle in 1977, the DC Circuit was faced with a situation that was and still is far too common in the American workplace. Paulette Barnes had been hired by the Environmental Protection Agency, but she quickly discovered she would not be able to do her work effectively. Her male supervisor repeatedly asked her to join him after work for social activities. She politely declined. He then made repeated sexual remarks and propositions to her. She refused. But her supervisor would not be deterred. He kept harassing her and even tried to convince her his behavior was common. Ms. Barnes could not escape these overtures and the unfair pressure she faced, because her job required her to work with her boss.

After she repeatedly refused to have an affair, he started to retaliate against her. He belittled her work. He took away many of her responsibilities. He harassed her continuously. Finally, he had her fired because she refused to go along with his demands.

Ms. Barnes sued her employer under title VII of the Civil Rights Act of 1964. Congress passed this important legislation in order to end workplace discrimination and open the doors to equal employment for all Americans, but the EPA did not see it this way. Its lawyers argued when Congress enacted title VII, we did not intend sexual harassment to be included in the ban on sexual discrimination.

What Ms. Barnes faced was not discrimination, they said. She was not fired because she was a woman but because she refused to engage in sexual activities with her supervisor. Fortunately, the judges of the DC Circuit understood the importance of the case. They took time to look into the record. They found our intent in passing title VII was to give women and minorities equal rights in the workplace so everyone would have a truly equal opportunity to succeed.

The judges agreed that so long as harassment of this kind was allowed to continue, women could not have equal rights in the workplace. They ruled that allowing female workers to suffer harassment to keep their jobs is a type of discrimination that has long relegated women to lower-level jobs and made it more difficult for them to have equal rights in the workplace.

The DC Circuit held that harassment of the type suffered by Ms. Barnes was illegal sex discrimination. If not for the judges of the DC Circuit, her case could have turned out very differently. Thus, the importance of the DC Circuit.

In 2003, the outcome of Ms. Barnes' case would almost certainly be a foregone conclusion. We know today the kind of behavior she faced is unacceptable, but in Ms. Barnes' case the trial judge dismissed her suit because he thought such harassment was not prohibited by title VII. That behavior was not unacceptable until the DC Circuit said it was unacceptable.

Would Mr. Estrada be the type of judge to give the meaning we intended to our legislation? Would he protect the rights of women and minorities? Would he take the time to consider how his rulings will affect them? We do not know, because the White House does not want us to know.

In a second case in 1981, Bundy v. Jackson, the DC Circuit considered the plight of another woman who had suffered severe harassment at work. Sandra Bundy proved at trial that while she was employed by the District of Columbia, she was repeatedly propositioned by some of her supervisors and they made crude and offensive remarks to her. She complained to another supervisor, but he replied it was natural for the other men in the office to harass. He then began the same type of abuse and propositioned her several times. A coworker obtained her home phone number, which she had unlisted, and started calling to proposition her. The facts in this case were so extreme and Ms. Bundy's situation was so oppressive that the district judge in the case actually made a formal finding that making of improper sexual advances to female employees was standard operating procedure, a fact of life, a normal condition of employment in her job. Miss Bundy began to complain more forcefully and her performance ratings began to suffer. She was denied a promotion and continued to endure anguish on the job.

When she took her case to court, the company admitted the harassment and argued it was legal. Can you believe that? The company admitted the harassment and argued it was legal. The company contended because Miss Bundy had not been fired or demoted, she could not claim a violation of title VII. The DC Circuit rejected this argument, as it obviously should have. The court held that the terms and conditions of employment include the psychological work environment. The court agreed that an employer can oppress an employee with such offensive and damaging remarks that the oppression rises to the level of discrimination, even if the employer does not demote or fire the employee.

As in Barnes, the court in Bundy showed thoughtful and careful consideration of what Congress intended to do for the American workplace when it passed title VII.

The court also considered the precarious situation in which Miss Bundy found herself and in which too many women often find themselves today. The court held unless Miss Bundy's rights were protected, many other workplaces could oppress and harass women in similar ways without any fear of legal repercussions. The DC Circuit held that title VII protects all Americans from harassment at work, whether or not harassment includes a formal change in job description.

We cannot dismiss these examples merely as evidence that America has changed since the 1970s and early 1980s. It was the courts such as the DC Circuit and opinions such as Barnes and

Bundy that made America change. The conclusion of these cases was not foregone. In both cases, the district judge had dismissed the claim, saying that what the women had alleged was not a violation of title VII. It took the judges on the DC Circuit, with genuine respect for the rule of law, to give effect to what Congress intended when it passed title VII. The DC Circuit did more than uphold the law. It gave practical effect to the right of women to be free from sexual harassment in the workplace.

We can now look back at the employers' arguments and in those cases say that they are preposterous. The sad truth, however, is that those arguments did not become preposterous until the DC Circuit said they were.

A third case to demonstrate the importance of this court is in Farmworker Justice Fund v. Brock. In 1987, the DC Circuit reviewed evidence developed over the course of many years that farm workers were being deprived of basic sanitation. The Department of Labor mandated the availability of drinking water, hand-washing facilities, and bathroom facilities in many other workplaces, but the Department said protections were not necessary for farm workers. The result was that many farm workers worked long hours in the heat and Sun without adequate drinking water. They worked under unacceptable hygiene conditions, without bathroom facilities, and with no place to wash their hands. Infectious diseases often spread quickly among farm workers.

Congress addressed this problem years before. The Occupational Safety and Health Act mandated that the Department issue rules on workplace conditions for farm workers but the Department disagreed. It thought that improving the working conditions of these laborers was a low priority, and for years the Department refused to say when it would even consider a rule to protect these workers. The Department also argued that although there was clear evidence of unacceptable risk to the health of farm workers, it would not promulgate a rule to end these conditions because the States were better able to do so. The DC Circuit correctly rejected that argument and brought safe and sanitary working conditions for farm workers across the country. The court held that the intent of Congress in passing OSHA was to limit the Department's discretion. The court ordered the Department to pass these regulations within a specific timeframe. The court said that workplace safety was precisely a matter for the U.S. Department of Labor to address to ensure safe conditions across the country. In deciding this case, the DC Circuit gave farm workers the protections they needed and ensured that a generation of workers would grow up healthier and safer.

A fourth excellent example of the importance of the DC Circuit is Laffey v. Northwest Airlines. In that case, decided in 1976, the DC Circuit considered the disparate pay that Northwest Airlines offered its male and female employees. Even before that case, it was clear that under the Equal Pay Act companies could not pay men and women different salaries for doing the same job. The airline thought it could avoid this requirement for its in-flight cabin attendants by creating two separate job categories for men and women. The two categories had essentially the same duties but different names and very different pay and promotion opportunities.

Both men and women would seat passengers and ensure their safety during the flight and both would deal with any medical problems that arose during the flight. They would both serve food and clean up the cabin. But the airline would only hire women to be stewardesses, a classification that meant being confined to domestic flights, while male persons were assigned to international flights. Even on domestic flights, stewardesses had to work in the more crowded sections of the plane while men worked in first class. In fact, if there was any real difference between the two jobs, it was that the women had the more difficult assignment. Yet the men received up to 55 percent more for doing essentially the same job.

The DC Circuit refused to allow the airline to design the jobs in a way that relegated women to low-paying positions with little chance of promotion. The court understood that when we passed the Equal Pay Act, Congress was not concerned with arbitrary technicalities. We were concerned with protecting the lives and livelihood of real people.

The DC Circuit gave effect to this intent. It held that where two individuals have jobs that are essentially identical because they have the same duties and responsibilities, an employer cannot discriminate against one of them by paying them less.

A fifth example of this indispensable role of the court is the Calvert Cliffs Coordinating Committee in which the DC Circuit in 1971 considered the National Environmental Protection Act which requires Federal agencies to balance their activities with their impact on the environment. In passing the act, Congress asks large agencies for the first time to consider ways to protect the environment.

In a challenge to this requirement, the Atomic Energy Commission was sued to stop activities that were adversely affecting the environment. The Commission said that it had taken environmental concerns into account and thought that these concerns were outweighed by the need for nuclear testing. The DC Circuit held that under the act, the Commission, as all other Federal agencies, must take environmental concerns seriously, must justify the burden that its activities would place on the environment.

Our duty, the court said, is to see that important legislative purposes prevailing in the Halls of Congress are not lost or misdirected in the vast hallways of the Federal bureaucracy. There is no better description of the unique demands on the DC Circuit. It has sole jurisdiction over many basic issues affecting the people of our country. The Senate needs to know that the judges of that court understand the enormous challenge of ensuring that the important policies we seek to achieve are actually implemented under the laws we pass.

In each of these examples, the DC Circuit has dealt with situations where real people face real problems in obtaining the justice they deserve. The court responded, as the Constitution says that it should, free from the pressures of politics. The DC Circuit respected the rule of law and applied it fairly.

Would Mr. Estrada continue this tradition? Or would he look for opportunities to limit or even roll back basic rights? We do not know because the White House insists on keeping the Senate and the country in the dark about this nomination. The fundamental rights of the American people are too important to be entrusted to a person about whom we know so little. Until we learn what kind of jurist Mr. Estrada can be, the Senate should not confirm him.

MEDICARE AND MEDICAID

Mr. President, a front page article in yesterday's New York Times should be essential reading for every Member of the Senate and for every American. It describes the Bush administration's stealth attack on Medicare and Medicaid—an attack driven by an extreme right-wing agenda and by powerful special interests.

The administration is proposing unacceptable changes in the obligations of government to its citizens. Under the Bush plan, the Nation's long-standing commitment to guarantee affordable health care to senior citizens, the poor, and the disabled would be broken. Medicare is a promise to the Nation's senior citizens, but for the administration, it is just another profit center for HMOs and other private insurance plans. Medicaid is a health care safety net for poor children and their parents, the disabled, and low income elderly, but the administration would shred that safety net to pay for tax cuts for the rich and to push its right-wing agenda.

The promise of Medicare could not be clearer. It says, play by the rules, contribute to the system during your working years, and you will be guaranteed affordable health care during your retirement years. For almost half a century, Medicare has delivered on that promise. All of us want to improve Medicare, but the administration's version of improving Medicare is to force senior citizens to give up their doctors and join HMOs. That is unacceptable to senior citizens and it should be unacceptable to the Congress. There is nothing wrong with

Medicare that the administration's policy can fix.

The administration has a variety of rationalizations for its assault on Medicare—and each of these rationalizations is wrong. Republicans have never liked Medicare. They opposed it from the beginning and have never stopped trying to undermine it. The Newt Gingrich Congress tried to destroy it a decade ago, but the American people rejected that strategy, and President Clinton vetoed it. Now that Republicans control both Houses of Congress and the Presidency, they are at it again. Their plan would say that no senior can get the Medicare prescription drug coverage they need without joining an HMO.

It is no accident that the administration's scheme hinges on forcing senior citizens into HMOs or other private insurance plans. Whether the issue is Medicare or the Patients' Bill of Rights, the administration stands with powerful special interests that seek higher profits and against patients who need medical care. If all senior citizens are forced to join an HMO, the revenues of that industry would increase more than $2.5 trillion over the next decade. Those are high stakes. There will be a big reward for HMOs and the insurance industry if the administration succeeds. But there is an even greater loss for senior citizens who have worked all their lives to earn their Medicare, and that loss should be unacceptable to all of us. Senior citizens should not be forced to give up the doctors they trust to get the prescription drugs they need.

The Bush administration cloaks this plan in the language of reasonableness. They say that they just want to reduce Medicare's cost, so that it will be affordable when the baby boom generation retires. But HMOs are a false prescription for saving money under Medicare.

Administrative costs under Medicare are just 2 percent. Ninety-eight cents of every Medicare dollar is spent on medical care for senior citizens. By contrast, profit and administrative costs for Medicare HMOs average eighteen percent, leaving far less for the medical care the plan is supposed to provide.

This chart is a pretty graphic reflection of this point. ''Private insurance, a recipe for reduced benefits or higher premiums.''

These are the administrative costs and profits: under Medicare, 2 percent; under private insurance, 18 percent.

I ask the administration, how is spending more money on administration and profit supposed to reduce Medicare costs?

In fact, Medicare has a better record of holding down costs than HMOs and private insurance. Since 1970, the cost per person of private insurance has increased 40 percent more than Medicare. Last year, the per person cost of Medicare went up 5.2 percent, but private insurance premiums went up more than twice as fast 12.7 percent. Across the country, families are seeing their health premiums soar and their health coverage cut back. If the administration really thinks this is the right prescription for Medicare, they should talk to working families in any community in America.

This chart indicates that private insurance will not reduce Medicare costs or improve its financial stability. It illustrates the increases in Medicare costs versus private insurance premiums: 5.2 percent under Medicare; 12.7 percent under private insurance.

The administration claims that drastic changes are needed because Medicare will become unaffordable as the ratio of active workers supporting the program to the number of retirees declines. But analyses from the Urban Institute, using the projections of the Medicare Trustees, show that Medicare will actually be less burdensome for the next generation of workers to support than it is for the current generation. Economic growth and productivity gains will raise incomes of workers by enough to more than offset both the change in the ratio of workers and the yearly increase in medical costs. In fact, the real product per worker—after Medicare is paid for—will increase from $66,000 to $101,000. The issue is priorities. For this administration, the priority is making the powerful and wealthy still more powerful and wealthy—not assuring affordable health care for senior citizens.

This administration also claims that the changes it is proposing are intended to help senior citizens by giving them more choices. The real choice that senior citizens want is the choice of the doctor and hospital that will give them the care they need—not the choice of an HMO that denies such care.

This chart, ''Senior citizens choose Medicare, not private insurance, shows the proportion of senior citizens choosing Medicare versus Medicare HMOs'': In 1999, 83 percent chose Medicare; 17 percent, HMOs; and in 2003, 89 percent, Medicare, while 11 percent, HMOs.

Seniors have a choice today and they choose Medicare. Even so, this administration's proposal will say to seniors: if you want to receive the prescription drug program, you will have to get it under an HMO.

Senior citizens who want it already have a choice of HMOs and private insurance plans that offer alternatives to Medicare. But by and large, senior citizens have rejected that choice. In 1999, 17 percent of senior citizens chose an HMO. By 2003, only eleven percent chose one.

Congress enacted Medicare in 1965, because private insurance could not and would not meet the needs of senior citizens. In 2003, private insurance still won't meet their needs. Vast areas of the country have no private insurance alternative to Medicare. Two hundred thousand seniors will be dropped by HMOs this year, because the HMOs are not making enough profit. Last year, HMOs dropped half a million seniors. In 2001, they dropped 900,000 seniors. Yet that is the system the administration wants to force on senior citizens.

This chart shows the number of senior citizens that have effectively been dumped from Medicare HMO coverage. We find that in 2001, 934,000 seniors were dropped; in 2002, 536,000 dumped; in 2003, 215,000; in the year 2000, 327,000; and 407,000 in 1999. HMOs have been dropping seniors who wanted voluntarily to be in the HMO system.

Under the Bush plan, states will have an incentive to cut back coverage for those in need and spend the money that should go for health care on other projects.

The Child Health Insurance Program, CHIP, which now gives more than five million children the chance for a healthy start in life will be abolished.

Millions of senior citizens will no longer be able to count on federal nursing home quality standards to protect them if they are unable to remain in their own homes.

Spouses of senior citizens who need nursing home care will no longer be guaranteed even a minimum amount of income and savings on which to live.

We know that state budgets are in trouble because of the faltering economy. The demands on Medicaid are greater than ever, as more families lose their job and their health care. Instead of the money that states need to maintain the Medicaid safety net, the Bush administration gives states a license to shred it. Every day, this administration makes it clearer that tax cuts to make the rich richer is a higher priority than health care for senior citizens, and low income children, and the disabled. It's time for Congress and administration to stand up for the priorities of the American people—not the priorities of the wealthy and powerful.

Medicare and Medicaid are two of the most successful social programs ever enacted. It makes no sense for the administration to try to impose its harsh right wing agenda on programs that have done so much to bring good health care and genuine health security to vast numbers of senior citizens, low-income families and the disabled. The American people will reject this misguided program and so should the Congress.

The administration is not in favor of real choices for the elderly. They don't favor letting senior citizens choose their own doctor. They don't favor a fair and unbiased choice between and HMO and Medicare. Senior citizens already have that. What the Bush administration favors is a Hobson's choice, where senior citizens are forced to choose between the doctor they trust and the prescription drugs they need. And that is an unacceptable choice. The administration's plan for Medicare will victimize 40 million senior citizens and the disabled on Medicare. I want to just draw the attention of the Members to this chart I have in the Chamber.

These are the Medicare HMOs. There are huge gaps for senior citizens, areas of the country with no Medicare+Choice plans. There are vast areas of the country, outlined in red, where they do not even have this program. And still, the administration wants to insist that seniors subscribe to it.

Under the Bush plan, long-term Federal spending for health care for the needy will be reduced under their new proposed block grant program for Medicaid. That idea was proposed under then-Congressman Gingrich almost a decade ago. Under the new program, long-term Federal funding for health care for the needy will be reduced so that more money will be available for tax cuts for the wealthy. Under the Bush plan, States will have an incentive to cut back coverage for those in need and spend the money that should go for health care on other projects.

The Child Health Insurance Program, the CHIP program, which now gives more than 5 million children the chance for a healthy start in life, will effectively be abolished.

Millions of senior citizens will no longer be able to count on the Federal nursing home quality standards to protect them if they are unable to remain in their own homes. I was here not many years ago when we took days to debate the kinds of protections that we were going to give to our seniors who were in nursing homes. The examples out there of the kinds of abuses that were taking place were shocking to all of us. So we passed rules and regulations. But under this particular proposal, the administration is recommending millions of seniors will no longer be able to count on Federal nursing home quality standards to protect them if they are unable to remain in their homes. Spouses of senior citizens who need nursing home care will no longer be guaranteed even a minimum amount of income or savings on which to live.

We know that State budgets are in trouble because of the faltering economy. The demands on Medicaid are greater than ever as more families lose their jobs and their health care. Instead of the money that States need to maintain the Medicaid safety net, the Bush administration gives States a license to shred it.

Every day, this administration makes it clearer that tax cuts to make the rich richer is a higher priority than health care for our senior citizens and low-income children and the disabled. That is the bottom line: Every day, this administration makes it clearer that tax cuts to make the rich richer is a higher priority than health care for our senior citizens and low-income children and the disabled.

It is time for Congress and the administration to stand up for the priorities of the American people, not the priorities of the wealthy and the powerful.

Medicare and Medicaid are two of the most successful social programs ever enacted. It makes no sense for the administration to try to impose its harsh right-wing agenda on programs that have done so much to bring good health care and genuine health security to vast numbers of senior citizens, low-income families, and the disabled.

The American people will reject this misguided program, and so should the Congress.

Mr. REID. Will the Senator yield for a question?

Mr. KENNEDY. I am glad to.

Mr. REID. I have listened on the floor and off the floor to the Senator's statement, and especially about Medicare and Medicaid.

I ask the Senator, we have heard now for 2 years from this administration that the answer to the problems of the country are tax cuts, tax cuts, tax cuts. I ask the Senator—and I am confident of the answer—if he is aware that the deficit this year will be the largest in the history of the world, about $500 billion if you do not mask it with the Social Security surpluses?

Now, I am asking the Senator from Massachusetts, will the proposals by this administration in their tax cut proposal do anything to help the people in Nevada and Massachusetts and the rest of the country who are desperate for help in regard to Medicare and Medicaid?

Mr. KENNEDY. Absolutely not. And your observation goes right to the heart of the central issue that we have in the Senate; that this is a question of choices. It is a question of priorities. It is a question of choices, whether we are going to allow this emasculation of Medicare and Medicaid—especially when Medicaid looks after so many needy children. About one-half of the coverage is actually for poor children, although more than two-thirds of the expenditures are for the elderly and the disabled. But it looks after an enormous number of the poorest of children, and also after the frail elderly.

And the Medicare system, we guaranteed in 1965—I was here at that time. I was here in 1964 when it was defeated. It was defeated in 1964, and then 8 months later it was proposed here on the floor of the Senate and it passed overwhelmingly. And 17 Senators who were against it in 1964 supported it in 1965. The only intervening act during that period of time was an election—an election. Finally, our colleagues had gone back home and listened to the needs of our elderly people, the men and women who had fought in the World Wars, who brought this country out of the Depression, who sacrificed for their children, who worked hard, played by the rules, and wanted some basic security during their senior years from the dangers of health care costs.

We made a commitment. The Senator remembers. I have heard him speak eloquently on it. And in that 1965 Medicare Act we guaranteed them hospitalization and we guaranteed them physician services, but we did not guarantee prescription drugs because only 3 percent of even the private insurance carriers were carrying it at that time.

I ask the Senator whether he would agree with me that now prescription drugs are as indispensable, are as essential to the seniors in Nevada as hospitalization and physician visits? They are in Massachusetts.

Mr. REID. Mr. President, I ask unanimous consent that I be allowed to answer the question of the Senator from Massachusetts without the Senator from Massachusetts losing the floor.

The PRESIDING OFFICER (Mr. CHAFEE). Is there objection?

Without objection, it is so ordered.

Mr. REID. I say to my friend from Massachusetts, while the Senator was serving in the Senate in those years, in the early 1960s and mid 1960s, I was serving on the hospital board of Southern Nevada Memorial Hospital, the largest hospital district in Nevada at that time. I was there when Medicaid came into being.

Now, does the Senator realize—and I think he has heard me say this before; and I ask this in the form of a question, although I don't need to; I have the floor to answer the Senator's question—prior to Medicaid coming into being, that for that hospital of ours, that public hospital, 40 percent of the senior citizens who came into that hospital had no health insurance?

And when we had people come into that hospital with, as I referred to them then, an old person—I don't quite look at it the same now—they would have to sign to be responsible for their mother, their father, their brother, their sister, whatever the case might be, that they would pay that hospital bill. And if they did not pay, do you know what we would do? We had a collection department. We would go out and sue them for the money.

Now, I say to my friend from Massachusetts, the distinguished Senator, for virtually every senior who comes to the hospital—it does not matter where they are in America—they have health insurance with Medicare.

Mr. KENNEDY. That is right.

Mr. REID. Medicare is an imperfect program, but it is a good program.

And I answer the question about pharmaceuticals, prescription drugs. When Medicare came into being, seniors did not need prescription drugs because we did not have the lifesaving drugs we have now. We did not have the drugs that made people feel better. We did not have the drugs that prevent disease. Now we have those.

I say to my friend from Massachusetts, rather than spending the time here, as we are dealing with a man who has a job, Miguel Estrada, making hundreds of thousands of dollars a year—rather than dealing with him, I would rather be dealing with people in Nevada who have no prescription drugs.

In America, the greatest power in the world, we have a medical program for senior citizens that does not have a prescription drug benefit. That is embarrassing to us as a country. And

what are we doing here? We are debating whether a man should have a job.

We understand the rules. If they want to get off this, then let them file cloture. If they want to get out of this, let them give us the memos from the Solicitor's Office. Let him come and answer questions or let them pull the nomination.

The reason they are not doing that is, they don't want to debate this stuff. Look at the chart the Senator has. Tax cuts of $1.8 trillion, what does that do to Medicare and Medicaid? I hope I have answered the Senator's question. A prescription drug benefit is a priority, and it has to be a program more than just in name only.

Mr. KENNEDY. I thank the Senator for his usual eloquence and passion.

Just to sum up two items, as we discussed earlier, we passed a prescription drug program. Fifty-two Members of the Senate did so last year. I don't know why we couldn't debate it. I am sure our leader would support that effort.

Finally, let me point out something the Senator has mentioned. This chart summarizes it all. Under the administration's program for the States, over a 10-year period, Medicaid will be cut $2.4 billion, while there will be $1.8 trillion in tax cuts.

This is a question of priorities. I went through the various charts that reflected how this $2.4 billion Medicaid cut will be achieved versus the $1.8 trillion in tax cuts. This is a question of choice. This is a question of priorities when it comes to the Medicare and Medicaid Programs. The quicker we get the chance to debate these and get some votes on them, the better off our seniors will be.

I yield the floor.

The PRESIDING OFFICER. The Senator from Idaho.

Mr. CRAIG. Mr. President, the Senator from Nevada has asked that we vote on Miguel Estrada. I ask unanimous consent that we proceed to a vote on Miguel Estrada now.

The PRESIDING OFFICER. Is there objection?

Mr. REID. Mr. President, I ask that the Senator's request be modified in the following fashion: I ask unanimous consent that after the Justice Department finds the requested documents relevant to Mr. Estrada's government service, which were first requested in May of 2001, the nominee then appear before the Judiciary Committee to answer the questions which he failed to answer in his confirmation hearing and any additional questions that may arise from reviewing such documents.

Mr. CRAIG. Mr. President, I object and restate my unanimous consent request.

Mr. REID. To which I object. I object.

Mr. CRAIG. Mr. President, I just heard the Democrat leader come to the floor to demand a vote on Miguel Estrada so we could move on to other important issues. He had the opportunity to have that vote, and he objected. He wants to raise the issue of moving judges to a supermajority vote, denying this man, Miguel Estrada, a vote on the floor of the Senate under the constitutional clause of advice and consent to the President.

Let me talk about that for a few moments. Before I talk about that, as the chairman of the Aging Committee who has spent countless hours, as has the Senator from Massachusetts, on the issue of Medicare, he and I would both agree that when Medicare was passed in 1965, some 33 years ago, medicine was practiced much differently than it is now. Yet he is saying we want Medicare just like it was, and we want to add a new program to it.

As the Senator from Massachusetts well knows, when he voted for Medicare in 1965, it was expected to be about a 10, 20-billion-dollar-plus program. Today it is verging on a quarter of a trillion dollars, at least by the end of the decade, and it will potentially, by 2030, consume a quarter of the U.S. Government's budget.

I know the Senator from Massachusetts knows as well as I that the world has changed and health care delivery has changed and that we are not going to practice 33-year-old medicine on 2003 seniors. They don't expect it. They don't want it. They demand change.

In that change comes prescription drugs as a reasonable and right approach. But as we offer that to America's seniors, let us offer them a modernized, contemporary health care delivery system. Let us not lurk in the concept of a 33-year-old system that is now close to pushing us to deny services simply because it has become so costly and so bureaucratic. To deny them anything more than a modern health care delivery system with prescription drugs in it is to deny them the obvious; that is, quality health care.

Those are the facts. Those are the statistics. We can certainly debate those today. But we ought to be debating Miguel Estrada. The Democrats want to debate him. They deny us the vote that he is entitled to have. So for a few moments today, I would like to visit about Miguel Estrada.

Before I do that, I found this most intriguing. This is a fascinating issue. We suggest that it is partisan, and it appears to be almost at times. Yet I noticed in the RECORD of today a few quotes from a Democrat Senator. He said:

> Mr. President, the court provides the foundation upon which the institutions of government and our free society are built. Their strength and legitimacy are derived from a long tradition of Federal judges whose knowledge, integrity, and impartiality are beyond reproach. The Senate is obligated, by the Constitution and the public interest, to protect the legitimacy and to ensure that the public's confidence in the court system is justified and continues for many years to come. As guardians of this trust, we must carefully scrutinize the credentials and qualifications of every man and woman nominated by the President to serve on the Federal bench. The men and women we approve for these lifetime appointments make important decisions each and every day which impact the American people. Once on the bench, they may be called upon to consider the extent of our rights to personal privacy, our rights to free speech, or even a criminal defendant's right to counsel. The importance of these positions and their influence must not be dismissed. We all have benefited from listening to the debate about Miguel Estrada's qualifications to serve on the district court. After reviewing Mr. Estrada's personal and professional credentials, including personally interviewing the nominee, I believe he is qualified to serve on the district court, and I will vote for him.

That is Senator NELSON of Nebraska. That Senator wants a vote. I want a vote. We owe Miguel Estrada a vote—not a supermajority vote, not an effort to change the rules of the Senate, not an effort to deny the constitutional responsibility of this body that the other side is now doing, tragically enough, for the politics of the business instead of the substance of the issue. That is a tragedy that ought not be laid upon the floor of this Senate nor ought to come before what has been a responsible process and very important procedure.

I have been out in my State for a week, as have many of my colleagues. I say oftentimes to Idahoans: We watch the President. We see him every night on television. We, Members of the Senate and the other body, make headlines and are often talked about in the press. But very seldom does the third and equally important branch of Government, the judicial branch, get the attention. There are no natural lobbyists in general. There is no influence out there urging and pushing that the courts be treated responsibly, that these vacant positions be filled so that courts can do their duty and responsibility under the Constitution and provide for fair judgment of those who might come before them.

That responsibility lies in the President of the United States and in the Senate. We are the ones responsible for assuring that the courts are filled when those positions are vacant by appropriate people who have great integrity, who have moral and ethical standards, and who believe in the Constitution of our country.

Miguel Estrada fails on none of those qualifications. Here today, for the first time, Mr. Estrada is a target for a much larger hit; that is to suggest that a minority of the Senate could ultimately control the Supreme Court of the United States. I believe that is the battleground, while a lot of subterfuge may go on, smoke and mirrors, or diversion of attention; and I think most people who are now watching this debate are beginning to understand there is something very strange about it.

There used to be an old advertisement on television asking, ''where's the beef.'' Well, where's the issue here? Where is the substance of the issue, after the committee of jurisdiction, the Judiciary Committee, on which I serve, and on which the Senator from Massachusetts serves, very thoroughly went

through the background of Miguel Estrada? He came out with high qualifications, having been reviewed by the ABA. Wherein lies the problem—the simple problem of allowing this name and nomination to come to the floor for a vote—a vote. I tendered that vote a few moments ago by unanimous consent, to see it denied on the other side of the aisle because they say you must have a super vote, a 60-plus vote. No, we suggest the Constitution doesn't say that. We suggest that threshold has never been required. So I think what is important here is the reality of the debate and how we have handled it.

I have the great privilege of serving from the West, from the State of Idaho. There are a lot of traditions out there. One of the great traditions is sitting around campfires, visiting, telling stories, and talking about the past. Probably one of the most popular stories to tell in the dark of night in only the glow of the campfire is a good ghost story. It scares the kids, and even the adults get a little nervous at times because their back side is dark and only their faces are illuminated. The imagination of the mind can go beyond what is really intended. So great stories get told at the campfire.

I have listened to this debate only to think that great stories are attempting to be told here—or should I suggest that ghost stories are being proposed here—about Miguel Estrada. Why would we want to be suggesting there is something about this man that is not known, that there is not full disclosure on all of the issues? I suggest there is full disclosure. The other side is deliberately obstructing a nomination that has been before the Senate for 21 months. In that 21 months, there were no ghost stories; nothing new was found, except the reality of the man himself—the reality of a really fascinating and valuable record for the American public to know.

Their argument is that because they cannot find anything wrong with him—no ghost stories—then there have to be bad things hidden. Somebody could not be quite as good as Miguel Estrada. Why not? There are a lot of people out there who achieve and are phenomenally successful, morally and ethically sound, and well based, and who believe in our Constitution and are willing to interpret it in relation to the law and not to the politics of something that might drive them personally.

I don't believe in activist judges on the courts. I don't believe they get to go beyond the law or attempt to take us where those of us who are lawmakers intend us not to go or where the Constitution itself would suggest we do not go. So search as they may, they cannot find. And when they cannot find, they will obstruct. They have obstructed. Week 1. We are now into week 2. My guess is we will be into week 3 or 4. Hopefully, the American people are listening and understanding something is wrong on the floor of the Senate; something is wrong in that there is an effort to change the Constitution of our country simply by process and procedure—or shall I say the denying of that. I think those are the issues at hand here. That is what is important.

Mr. President, there was nothing more in telling a ghost story than in the imagination that came to the mind. There is nothing wrong with Miguel Estrada, except in the imagination in the minds of the other side, who would like to find a story to tell. But they cannot find one, dig as they might. There have been 21 months of effort, 21 months of denial. Why? Are we playing out Presidential politics on the floor of the Senate this year? It is possible. I hope we don't have to go there, and we should not. These are issues that are much too important.

This President has done what he should do. It is his responsibility to find men and women of high quality and high integrity, who are well educated and well trained in the judicial process and system—search them out and recommend them, nominate them to fill these judgeships. That is what he has done. Now he is being denied that.

A difference of philosophy? Yes, sure. It is his right to choose those he feels can best serve. He has found and has offered to us men and women of extremely high quality. Yet, at these higher court levels, and here in the district court, they are being denied.

Miguel Estrada has been under the microscope and nobody has found the problem. On the contrary, we have found much to admire. At least let me speak for myself. I have found much to admire in Miguel Estrada. By now, I don't need to repeat his history. I don't need to repeat the story of a young man coming to this country at 17 years of age, hardly able to speak English, who changed himself and the world around him, so that he is now recognized by many as a phenomenal talent and a scholar. Let me just say I think he and his family should be very proud of his achievements. They should also be proud of his receiving the nomination. Of all the people, they surely do not deserve to have the judicial nomination process turned into some kind of gamut, in which you run a person through and you throw mud at them, or you allege, or you imply, or you search for the ultimate ghost story that doesn't exist, to damage their integrity, to damage the image and the value and quality of the person.

Senators are within their rights to oppose any judicial nominee on any basis they choose. In the last 8 years, when President Clinton was President, I voted for some of his judges; I voted against some of them because they didn't fit my criteria of what I thought would be a responsible judge for the court. But I never stood on the floor and denied a vote, obstructed a vote. I always thought it was important that they be brought to the floor for a vote. Then we could debate them and they would either be confirmed or denied on a simple vote by a majority of those present and voting. That is what our Constitution speaks to. That is what our Founding Fathers intended. They didn't believe we should allow a minority of the people serving to deny the majority the right to evaluate and confirm the nominations of a President to the judicial branch of our Government.

If they want to administer a particular litmus test, as one of our colleagues on the Judiciary Committee has been advocating, that is their choice. If they simply do not like the way a nominee answered the questions that were put to him, then they can vote against the nominee for all of the reasons and the responsibilities of a Senator. But to say they cannot vote because there is no information about the nominee, or because he has not answered their questions, or because critical information is being withheld, well, that is clearly a figment of their imagination. That is a ghost lurking somewhere in the mind of a Senator, because for 21 months, try as they might, that ghost, or that allegation, has not been found or fulfilled.

In the real world, there is an enormous record on this nominee, bigger than the records of most of the judiciary nominees who have been confirmed by the Senate. In the real world, Mr. Estrada has answered question after question, just not always the way his opponents wished he would answer them; not just exactly the way his opponents would wish he had answered them, but he did answer them. In the real world, there is no smoking gun in the privileged documents that the opposition is unreasonably and inappropriately requesting.

There is something very familiar about the tactic being used against Miguel Estrada, and I finally realized what it was. This is the same obstructionism we have seen again and again from our friends on the other side, the same process that denied us the right to a budget, the right to appropriations for 12 long months. They could not even produce a budget. So we brought it to the floor and in 4 weeks we finalized that process.

For the last year and a half, we have lived with that issue of obstructionism, and today we are with it again. Now we are in our second week of denying an up-or-down vote. What is wrong with having an up-or-down vote? That is our responsibility. That is what we are charged to do under the Constitution.

I believe that is the issue. Instead of fighting on policy grounds, they are simply wanting to deny this issue to death. In the last Congress, as I mentioned, we had no budget, we saw an Energy Committee shut down because they would not allow that Energy Committee to write an energy bill, and they would not allow authorizing committees to function in a bipartisan way when they controlled the majority. Denial and obstruction is not a way to run a system. It is certainly not the way to operate the Senate.

Now we have a personality. Now it is not an abstract concept. Now it is not a piece of a budget or a dollar and a cent, as important as those issues are. We are talking about an individual who has served our country well, who has achieved at the highest levels, who is a man of tremendous integrity, and because he does not fit their philosophic test, the litmus test of their philosophy as to those they want on the court, but he does achieve all of the recognition of all of those who judge those who go to the court on the standards by which we have always assessed nominees to the judiciary system, that is not good enough anymore. The reason it is not good enough is because it is President George Bush who has made that nomination.

In the current Congress, that is an issue with which we should not have to deal. We should be allowed to vote, and I hope that ultimately we can, and certainly we will work very hard to allow that to happen. That is what we ought to be allowed to offer: to come to the floor, have an up-or-down vote on Miguel Estrada, debating for 1 week, debating for 2 weeks, debating for 3 weeks, if we must, but ultimately a vote by Senators doing what they are charged to do.

That is the most important step and, of course, that is the issue. Or is the issue changing the name of the game, changing or raising the bar, in this instance, to a higher level of vote, not for Miguel Estrada but for future votes, possibly a Supreme Court Justice? I do not know what the strategy is, but there is a strategy.

It is undeniable because we have seen it day after day, time after time. We watched it when they chaired the Judiciary Committee last year. I now serve on the Judiciary Committee. I went there this year with the purpose of trying to move judges through, trying to get done what is our responsibility to do, trying to fill the phenomenal number of vacancies. When there are vacancies in the court and caseloads are building, that means somebody is being denied justice. We should not allow our judiciary system to become so politicized by the process that it cannot do what it is charged to do. Therein lies the issue. I believe it is an important issue for us, and it is one I hope we will deal with if we have to continue to debate it.

Let me close with this other argument because I found this one most interesting. They said: We are just rubberstamping George Bush's nominations. Have you ever used a rubberstamp? Have you ever picked up a stamp, tapped it to an ink pad, tapped it to a piece of paper? That is called rubberstamping. My guess is it takes less than a minute, less than a half a minute, less than a second to use a rubberstamp.

That is a false analogy. Twenty-one months does not a rubberstamp make; 21 months of thorough examination, hours of examination by the American Bar Association. I am not an attorney, but my colleague from Nevada is. It used to be the highest rating possible that the American Bar Association would give in rating the qualifications of a nominee. I used to say that rating was probably too liberal. Now I say it is a respectable rating. Why? Because the bar on the other side has been raised well beyond that rating. Now we are litmus testing all kinds of philosophical attitudes that the other side demands a nominee have, and if they say, We are simply going to enforce or carry out or interpret the law against the Constitution, that is no longer good enough. Rubberstamping? A 5-second process, a 2-second process, or a 21-month process? I suggest there is no rubberstamping here.

I suggest the Judiciary Committee, under the chairmanship of PAT LEAHY, now under the chairmanship of ORRIN HATCH, has done a thorough job of examining Miguel Estrada, who has a personal history that is inspiring, work achievement that is phenomenally impressive, a competence and a character that has won him testimonials from all of his coworkers and friends, Democrats and Republicans, liberal and conservative.

As I mentioned, I am a new member of the Judiciary Committee. It is the first time in 40 years that an Idahoan has served on that committee, and I am not a lawyer. So I look at these nominees differently than my colleagues who serve on that committee who are lawyers. But I understand records. I understand achievement. I understand integrity. I understand morals, ethics, and standards that are as high as Miguel Estrada's.

I am humbled in his presence that a man could achieve as much as he has in as short a time as he has. I am angered—no, I guess one does not get angry in this business. I am frustrated, extremely frustrated that my colleagues on the other side would decide to play the game with a human being of the quality of Miguel Estrada, to use him for a target for another purpose, to use him in their game plan for politics in this country, to rub themselves up against the Constitution, to have the Washington Post say: Time's up. Enough is enough. To have newspaper after newspaper across the country say: Democrats, you have gone too far this time. Many are now saying that, and that is too bad to allow that much partisan politics to enter the debate.

We all know that partisan politics will often enter debates, but it does not deny the process. It does not obstruct the process. It does not destroy the process. Ultimately, the responsibility is to vote, and it is not a supermajority. The Senator from Nevada knows that, and the Senator from Idaho knows that. I could ask unanimous consent again that we move to a vote on the nomination of Miguel Estrada, and the Senator would stand up and say: I object.

That is how one gets to the vote on the floor of the Senate. After the issue has been thoroughly considered, Senators ultimately move to a vote. That is my responsibility as a Senator. That is one that I will work for in the coming days. That is one that many of my colleagues are working for.

We will come to the floor, we will continue to debate the fine points of Miguel Estrada, but we will not raise the bar. We should not set a new standard. In this instance, we should not allow a minority of Senators to deny the process because there is now a substantial majority who would vote for Miguel Estrada because they, as I, have read his record, have listened to the debate, have thoroughly combed through all of the files to understand that we have a man of phenomenally high integrity who can serve this country well on the District Court of Appeals that he has been nominated by President Bush to serve on.

Our responsibility is but one: to listen, to understand, to make a judgment, and to vote up or down on Miguel Estrada. So I ask the question, Is that what the other side will allow? Or are they going to continue to deny that? Are they going to continue to demand that a new standard be set? The American people need to hear that. They need to understand what is going on on the floor of the Senate, and many are now beginning to grasp that.

As newspapers talk about it, some in the Hispanic community are now concerned that somehow this has become a racist issue. I do not think so. I hope not. It should not be. It must not be. Tragically, we are talking about a fine man who is ready to serve this country and who is being caught up in the politics of the day, and that should not happen on the floor of the Senate.

Before I got into politics, I was a rancher in Idaho, and I can vouch for the fact that a lot of cowboy traditions are still alive and well in the Intermountain West. One of those great traditions is storytelling—gathering around a campfire and telling ghost stories. Some of those stories can be pretty scary. But nobody really believes them—certainly not adults, and not in the light of day.

I am reminded of that storytelling tradition of the West when I look back on the debate surrounding Miguel Estrada to the U.S. Court of Appeals for the D.C. District. The reason this debate reminds me of those old ghost stories is that the opposition's arguments amount to just that: stories about imagined ghosts and monsters, told for the purpose of frightening people.

I have been serving in the Senate for better than a decade, and I have seen a lot of filibusters about a lot of things, but this is the first time I have seen a filibuster over nothing—that's right: nothing. The other side is deliberately obstructing the nomination of Miguel Estrada because after 21 months they can find nothing wrong with this nominee.

Their argument is that because they cannot find anything wrong with him,

all the bad things must be hidden, and therefore they need more time for their fishing expedition on this nomination. Only now, that fishing expedition is going into documents that are privileged, and public policy itself would be violated by breaking that privilege. That's not just my opinion—as we have heard again and again, it is the opinion of the seven living former Solicitors General, both Democrat and Republican.

With nothing to complain about, the opposition is trying to get us all to believe that there must be some terrible disqualifying information that is being withheld from the Senate. What that terrible information is, they leave us to imagine: maybe some writings that will reveal a monster who is going to ascend to the bench where he can rip the Constitution to shreds and roll back civil liberties. Maybe something even worse.

These are nothing more than ghost stories, deliberately attempting to frighten the American people and this Senate. It is time to shine the light of day on this debate, time to realize there is no monster under the bed.

And it is high time that the Democrat leadership put a stop to the politics of character assassination that go along with all this storytelling. It is outrageous to suggest that Miguel Estrada is hiding something, or being less than forthcoming with this Senate. The Senate Judiciary Committee had plenty of time over the last 21 months to find some real problem with this nominee—but no such problem was found. The American Bar Association reviewed him, found nothing wrong with him, and even gave him its highest rating—''well qualified.'' The Bush administration looked into his record before sending up the nomination. And let's not forget that he worked for the previous administration, too, which not only hired him but gave him good reviews.

So Miguel Estrada has been under the microscope, and nobody has found a problem with him. On the contrary, we have found much to admire—at least, let me speak for myself—I have found much to admire about Mr. Estrada. By now, his story is pretty well known to anyone who follows the daily news, let alone Senators who study the nominees who come before them, so I won't repeat it again. Let me just say that I think he and his family should be very proud of his achievements. They should also be proud of his receiving this nomination. And of all people, they surely do not deserve to have the judicial nomination process turned into some kind of grueling gauntlet through the mud being generated by the opposition.

Senators are within their rights to oppose any judicial nominee on any basis they choose. If they want to administer a particular litmus test, as one of our colleagues on the Judiciary Committee has been advocating, that is their choice. If they simply do not like the way a nominee answered the questions that were put to him, then they can vote against that nominee for that reason.

But to say they cannot vote because there is no information about this nominee, or because he has not answered their questions, or because critical information is being withheld—well, apparently they do not live in the same world the rest of us do. Because in the real world, there is an enormous record on this nominee—bigger than the records on most of the judicial nominees who have been confirmed by the Senate. In the real world, Mr. Estrada has answered question after question—just no always the way that his opponents wished he would have answered. And in the real world, there is no smoking gun in the privileged documents that the opposition is unreasonably and inappropriately requesting.

There is something very familiar about this tactic being used against Miguel Estrada, and I finally realized what it was: this is the same obstructionism that we have seen again and again from our friends on the other side. Instead of fighting on policy grounds, they just obstruct and delay the issue to death. In the last Congress, we never got a budget, we never got an energy bill—just more obstruction and delay. And in this current Congress, instead of having an honest up-or-down vote on this nominee, they filibuster about the past history of judicial nominees under former administrations.

Another of my colleagues revealed during this debate that obstructionism is a tactic out of a playbook for stopping President Bush from getting his nominees to the higher courts—maybe not every court, but certainly the circuit courts and maybe someday the Supreme Court. We have heard on this Senate floor about that playbook advising our Democrat colleagues to use the Senate rules to delay and obstruct nominees—first in committee and then on the Senate floor.

This is the first step in raising the bar for all of President Bush's nominees. That is the goal—to raise the bar, to impose new tests never envisioned in the Constitution, for anyone nominated by President Bush. Make no mistake about this: it is partisan politics at its most fundamental. Instead of the Senate performing its constitutional role of advise and consent, the Democrat leadership intends to put itself in a position to dictate to the President who his nominees can be. Instead of allowing the normal process to work—the process through which all judicial nominees have gone before—they are fashioning a new set of tests that will become the standard.

And while I am talking about raising the bar, let me anticipate the argument of the opposition. I have heard a lot from my Democrat colleagues about how they are offended at being expected to ''rubberstamp'' President Bush's nominees. Last I checked, it takes about two seconds to ''rubberstamp'' something; you just pound the stamp on an inkpad and then on a piece of paper, and you are done.

This nomination, on the other hand, has been in the works for 21 months, involved extensive hearings by a then-Democrat-led Judiciary Committee, included supplemental questions posed by Committee members, a non-unanimous vote of that Committee, and weeks of debate on this floor. For any Senator to say this amounts to being pushed into ''rubberstamping'' this nominee is hogwash.

Furthermore, anybody who wants to complain about ''rubberstamping'' ought to be out here standing side by side with Republicans, demanding an up-or-down vote on this nominee. I say to my colleagues, if you are not satisfied that this nominee will be a good judge on the Court of Appeals, then vote against him. If you are sincere about your objections, and not just playing political games, then you have nothing to lose by demanding a fair vote.

I do not see how anybody could read the record on this nominee and listen to the debate in this Senate and not conclude that Miguel Estrada will serve the United States with distinction on the Federal bench. His personal history is inspiring; his work achievements are impressive; his competence and character have won him testimonials from friends and coworkers of every political stripe.

I am a new member of the Judiciary Committee—the first Idahoan to serve on that committee in more than forty years—and I am proud to say that my first recorded vote on that committee was to confirm Mr. Estrada. I am now asking my colleagues to allow the full Senate to have the opportunity to vote on this nominee. Let us stop the storytelling, get back to the real world, and have a fair up-or-down vote on the confirmation of Miguel Estrada.

I yield the floor.

The PRESIDING OFFICER (Mrs. DOLE). The Democratic whip.

Mr. REID. Mr. President, the Democratic leader was on the floor this morning and spoke at some length about the problems facing this country. The problems facing this country are significant. It is untoward, as the Democratic leader stated, that we are not dealing with issues the people we represent, who are in our home States, want to talk about. They want us to do something about the health care delivery system in this country. That includes prescription drugs. It includes the Patients' Bill of Rights. It includes Medicare. It includes Medicaid.

The people at home want us to at least remember that we have environmental problems facing this country that we need to deal with. The people at home understand education is a significant issue. The people at home understand their State—there are only four States that do not have a budget deficit. All other States are spending in the red. They want some help. We, as a

Senate, deserve to deal with those and other issues that the people of our States believe we should be talking about.

There have been a number of requests made: Why do we not vote on this in 6 hours, 4 hours, 2 hours, 10 hours, 2 days, Friday by 9:30? And we have said very simply—this is the ninth day of this debate covering a period of approximately 3 weeks—Miguel Estrada needs to be candid and forthright. And how is that going to be accomplished? It is going to be accomplished by his giving us information, answering questions, and giving us the memos he wrote when he was at the Solicitor General's Office.

We should be dealing with the issues I have outlined, and others, issues that people really care about at home. But, no, we are not going to take up S. 414 that Senator DASCHLE asked unanimous consent that we move to, the economic stimulus package the Democrats prefer. What it does is give immediate tax relief to the middle class and has no long-term impact on the deficit of this country.

If we brought that up and the majority did not like our bill, we could have a debate on what is the best thing to do to deal with the financial woes of this country. That is what we should be dealing with.

As I have said earlier today, and I repeat, the reason we are not dealing with those issues of immense importance to this country is the majority does not have a plan or a program.

The President's tax cut proposal, his own Republicans do not like it. The chairman of the Ways and Means Committee of the House does not like it. Individual Members of the Senate, who are Republicans, who do not like his program, have written to him and talked to him. So that is why they are not bringing that up.

Why are we not going to do something dealing with health care? Because they do not have their act together. They do not know what they want.

So without running through each issue we should be talking about, let me simply say Miguel Estrada needs to be resolved and can be resolved in three ways: The nomination be pulled and we can go to more important issues; No. 2, he can answer the questions people want to propound to him and have propounded to him; and thirdly, he submit the memos he wrote when he was in the Solicitor General's Office and answer questions.

There has been a lot said in righteous indignation: We cannot give these memos because it would set a precedent that has never been set in the history of this country. Senators DASCHLE and LEAHY, the Democratic leader and the ranking member of the Judiciary Committee, wrote to the White House and said: Give us the memos. Let him answer the questions.

We get a 15-page letter back from Gonzales, the counsel to the President, saying: We are not going to do that.

My staff just showed me a letter—I guess he did not have time, as counsel to the President did, to write a 15-page letter—in two or three sentences saying that Gonzales, if he wanted to talk to Senator DASCHLE and I, they would have him come forward and he could sit down and talk to us.

We are not going to do that. The Democrats in the Judiciary Committee unanimously voted against Miguel Estrada because he did not answer the questions and he did not submit the memos.

My case to the Senate, my case to the American people, is there is no precedent set by his giving this information, and I say that for a number of reasons.

I have a detailed letter from the Department of Justice describing their efforts to respond to the Senate's request for Chief Justice Rehnquist's Office of Legal Counsel memos during his nomination—he was a Supreme Court Justice at the time, but now he is the Chief Justice—and a legal letter from the Department of Legislative and Intergovernmental Affairs, John Bolton, on August 7, 1986, which states and I quote:

We attach an index of those documents—

Rehnquist legal memorandum from when he was the Assistant Attorney General for the Office of Legal Counsel in the Solicitor's Office—

and will provide the Committee with access in accordance with our existing agreement.

The letter also indicates that numerous other legal memoranda were provided to the committee prior to that date. The letter also contains an attachment, ''Index to Supplemental Release to Senate Judiciary Committee,'' which lists three additional memos relating to legal constraints on possible use of troops to prevent movement of May Day demonstrators, possible limitations posed by the Posse Comitatus Act on the use of troops, authority of members of the Armed Forces on duty in civil disturbances to make arrests.

These are internal memos, obviously, written by attorneys containing legal analyses and deliberations about very sensitive issues. Again, it is obvious that legal memos similar to Mr. Estrada's were provided to the Senate Judiciary Committee, reviewed and returned to the Department. In fact, Senator BIDEN, still a member of this body, wrote to Attorney General Meese to thank him for his cooperation and then asked for additional memos that I assume were provided.

I ask unanimous consent that a letter dated July 23, 1986, written to the Honorable Strom Thurmond, chairman of the Senate Judiciary Committee, from JOE BIDEN asking that the Department of Justice supply certain information regarding the nomination of William B. Rehnquist to be Chief Justice, I ask simply that that matter be forwarded to the Senate and be printed in the RECORD.

As well, we have a request back—I am sorry. We have a letter written to JOE BIDEN from Senator EDWARD M. KENNEDY, Howard Metzenbaum, and Paul Simon, members of that Judiciary Committee, who asked for certain information dealing with memoranda that Rehnquist prepared. We have a letter written to Attorney General Meese from JOE BIDEN setting forth the materials that were requested, together with Rehnquist documents that are wanted. We have a letter dated August 7 to Chairman Thurmond from John Bolton that I referred to in more general terms. That lists in detail the material that was supplied.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC, July 23, 1986.

Hon. STROM THURMOND,
Chairman, Senate Judiciary Committee, Washington, DC.

DEAR STROM: I have enclosed the request of the Department of Justice for documents concerning the nomination of William H. Rehnquist to be Chief Justice. Please forward the enclosed request for expedited consideration by the Department. I understand it may be necessary to develop mutually satisfying procedures should any of the requested documents be provided to the Committee on a restricted basis.

Sincerely,

JOSEPH R. BIDEN, Jr.,
Ranking Minority Member.

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC, July 23, 1986.

Hon. JOSEPH R. BIDEN, Jr.,
Ranking Minority Member, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR JOE: In preparation for the Senate Judiciary Committee hearings on the nomination of William H. Rehnquist be to Chief Justice of the United States, please ask Chairman Thurmond to provide the following information and materials, as soon as possible:

1. For the period from 1969–1971, during which Mr. Rehnquist served as Assistant Attorney General for the Office of Legal Counsel, all memoranda, correspondence, and other materials on which Mr. Rehnquist is designated as a recipient, or materials prepared by Mr. Rehnquist or his staff, for his approval, or on which his mane or initials appears, related to the following:

—executive privilege;

—national security, including but not limited to domestic surveillance, anti-war demonstrators, wiretapping, reform of the classification system, the May Day demonstration, the Kent State killings, and the investigation of leaks;

—the nominations of Harry A. Blackmun and G. Harrold Carswell to be Associate Justices of the Supreme Court;

—civil rights;

—civil liberties.

2. The memo prepared by law clerk Donald Cronson for Justice Jackson concerning the school desegregation cases, entitled, ''A Few Expressed Prejudices on the Segregation Cases''.

3. The original of the Cronson cable to Mr. Rehnquist in 1971, which appears in the Congressional Record of December 9, 1971.

4. Financial disclosure statements for Justice Rehnquist for the period from his appointment to the Court until 1982.

5. Any book contracts to which Justice Rehnquist is a signatory and which were in

effect for all or any part of the period from January 1984 to the present, or for which he was engaged in negotiations during the same period.

Sincerely,

EDWARD M. KENNEDY.
HOWARD M. METZENBAUM.
PAUL SIMON.

U.S. SENATE,
COMMITTEE ON THE JUDICIARY
Washington, DC, August 6, 1986.

Hon. EDWIN MEESE III,
Attorney General, Department of Justice, Washington, DC.

DEAR MR. ATTORNEY GENERAL: First, I wish to express my appreciation for the manner in which we were able to resolve the issue of access to documents which we requested in connection with Justice Rehnquist's confirmation proceedings. I am delighted that we were able to work out a mutually acceptable accommodation of our respective responsibilities.

We have now had an opportunity to conduct a preliminary examination of the materials which were provided to us last evening, and we have noticed that several of the items refer to other materials, most of which appear to be incoming communications to which the nominee was responding while he headed the Office of Legal Counsel. Attached hereto is a list of those other materials, and I would appreciate your taking appropriate steps to see that those items are made available as soon as possible.

Finally, once you have provided us with access to these additional materials, I would appreciate your providing us with a written description of the steps which have been taken, and the files which have been searched, in your Department's effort to be responsive to our requests.

Once again, thanks for your continuing assistance.

Sincerely,

JOSEPH R. BIDEN, Jr.,
Ranking Minority Member.

REHNQUIST DOCUMENTS

A. Letter from Lt. Gen. Exton, dated Dec. 2, 1970. (This item is referenced in the attachments to I.2.)

B. The ''transmittal of June 5, 1969'' from Herbert E. Hoffman, (This item is referenced in II.1.)

C. The ''directive . . . sent out by General Haig on June 30.'' (This item is referenced on the first page of the first attachment to II.2.)

D. ''Haig memorandum of June 30.'' (This item is referenced on the first page of the first attachment to II.2.)

E. ''NSSM–113''. (This item is referenced in II.4.)

F. The ''request'' of William H. Rehnquist. (This is referenced in the first paragraph of II.5.)

G. The ''request'' of William H. Rehnquist. (This item is referenced in the first paragraph of II.6.)

H. John Dean's ''memorandum of Nov. 16, 1970.'' (This item is referenced in II.8.)

I. Robert Mardian's ''memorandum of January 18, 1971.'' (This item is referenced in II.10.)

J. The ''similar memorandum to Mr. Pellerzi and his response of January 21 concerning the above-captioned matter.'' (These *two* items are referenced in II.10.)

K. Kenneth E. BeLieu's ''request of October 28, 1969 for rebuttal material.'' (This item is referenced in V.1.)

L. William D. Ruckelshaus' ''memorandum of December 19, 1969.'' (This item is referenced in VI.2, and in VI.4.)

M. William D. Ruckelshaus' ''memorandum of February 6, 1970.'' (This item is referenced in VI.5.)

N. Mr. Revercomb's request. (This item is referenced in I.1.)

DEPARTMENT OF JUSTICE, OFFICE OF LEGISLATIVE AND INTERGOVERNMENTAL AFFAIRS,
Washington, DC, August 7, 1986.

Hon. STROM THURMOND,
Chairman, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR CHAIRMAN THURMOND: This letter responds to Senator Biden's August 6 request for certain additional materials referred to in the documents from the Office of Legal Counsel (OLC) that were made available for the Committee's review, and for an explanation of the procedures followed by the Office of Legal Counsel in locating and reviewing those materials. Because OLC went to extraordinary lengths in responding to the document requests in a very short time, I think it would be useful to describe those efforts first.

The files of the Office of Legal Counsel for the years 1969–1971 are maintained in two, duplicative sets: one in hard copy (on a chronological basis) and the other on a computerized system (which can be searched by words or phrases). The Office's normal procedure in response to any request for documents—be it from the public, another government agency, or from a member of Congress—is to conduct a search through the computer system to locate the potentially responsive document or documents. The documents thus identified are then reviewed in hard copy to determine whether they are responsive to the request and whether they may be released, consistent with preserving the integrity of the Office's role as confidential legal advisor to the Attorney General and to the President. The computer search and review is supervised directly by senior career personnel of the Office.

In this case, the Office went far beyond its routine process to ensure the comprehensiveness of its response. In keeping with established procedures, members of the career OLC staff, under the supervision of the senior career lawyer who usually handles such matters, performed extensive subject matter searches of the computer data base to identify all documents in the files that were conceivably responsive to the request. Those documents were then reviewed by a senior career staff lawyer to determine their responsiveness. In addition, OLC career staff performed an overlapping review, from the hard copy files maintained by OLC for 1969–1971, of all documents prepared by or under the direction and supervision of Mr. Rehnquist. Finally, a staff lawyer worked with the Records Management Division of the Department of Justice to try to identify and locate any files stored in the federal records center that might possibly contain responsive documents.

I note that review of the stored files in this manner is extraordinary and to our knowledge unprecedented. The OLC files from the relevant time period were consolidated with other Departmental files by the Records Management Division, and then processed and maintained by that Division based on a complicated and incomplete filing system. It is virtually impossible to determine whether documents from the Office of Legal Counsel may be in a particular stored file, or indeed to determine whether particular files were maintained.

Nonetheless, in an effort to be as complete as possible in responding to the request, OLC undertook to try to identify any stored files that could conceivably contain responsive documents. Although an initial review of the index maintained by the Records Management Division did not suggest that those files contained responsive material that OLC had not previously located, in an abundance of caution OLC requested access to any possibly relevant files. Those files were received from the records center in Suitland, Maryland, late yesterday afternoon. Based on a review of those files by OLC career staff, OLC located three additional memoranda relating to the May Day arrests, each of which was prepared by OLC staff. We attach an index of those documents, and will provide the Committee with access in accordance with our existing agreement.

In addition, the files received from the federal records center included a copy of the December 2, 1970, letter from Lt. Gen. Exton, which is requested as item A by Senator Biden in his August 6 letter. We will also furnish this letter to the Committee under the same terms. With the exception of item M on Senator Biden's list, which has already been made available to the Committee, OLC has been unable to locate any of the other requested materials in its files or in the stored files. Many of these documents may, in fact, no longer exist. The various ''requests'' listed as items F, G, and K, for example, were most likely oral requests that were never memorialized in writing.

In sum, the staff of the Office of Legal Counsel went to extraordinary lengths to ensure that all responsive materials were located, putting literally hundreds of hours into this project.

Please let me know if we can be of further assistance.

Sincerely,

JOHN R. BOLTON,
Assistant Attorney General.

INDEX TO SUPPLEMENTAL RELEASE TO SENATE JUDICIARY COMMITTEE

1. 5/71 memo to file from Eric Fygi: ''Prevention by Use of Troops of Departure of Mayday Demonstrators from West Potomac Park for Demonstration Sites''

This memorandum discusses legal constraints on possible use of troops to prevent movement of May Day demonstrators.

2. 4/26/71 memo to WHR from Eric Fygi and Mary C. Lawton: ''Legal and Practical Considerations Concerning Protective Actions by the United States to Ameliorate the 'Mayday Movement' Traffic Project''

This memorandum discusses possible limitations posed by the Posse Comitatus Act on the use of troops in connection with the planned May Day demonstrations.

3. 4/29/71 memo to file from Mary C. Lawton (copy provided to WHR): ''Authority of members of the Armed Forces on duty in civil disturbances to make arrest''

This memorandum questions arising under federal and D.C. law and the Uniform Code of Military Justice with respect to arrests by members of the armed forces.

4. 12/3/70 letter from Lt. Gen. H.M. Exton to Attorney General Mitchell (as requested by Senator Biden's letter of August 6, 1986).

Mr. REID. Madam President, my friend from Idaho, the distinguished senior Senator—and he is my friend; I have the greatest respect for him; he is a fine man; he represents his State very well—I respectfully submit to this body my friend's statements regarding what the Senate did not do last year is a statement made through a pair of glasses that obviously are very foggy.

I say that because there is a lot of talk here about things that were not done. But the fact is the work that was left undone last year was left undone as a result of the President of the United States and the Republican-led House of Representatives not allowing us to move the appropriations bills. We

passed 2 bills, leaving 11 undone. The House of Representatives simply refused to take votes on those very difficult bills. They knew if they took votes on those bills as they wanted them in the House of Representatives, it would create chaos among the people in the country because the people would know then that the Republicans simply were not meeting the demands of the American people.

As a result of that, even though we passed every bill out of the Senate Appropriations Committee—all 13—we were not allowed to take them up. So we have to understand that is basically the way it is.

The senior Senator from Idaho has talked about the need to have a vote on Estrada. It is within the total power of the majority to have a vote. How do they have a vote? The rules in this body have been the same for a long time: File a motion to invoke cloture. Why does the Senate have a rule such as this? The Senate of the United States, as our Founding Fathers said, is the saucer that cools the coffee. The Constitution of the United States is a document that is not to protect the majority; this Constitution protects minorities. The majority can always protect itself. The Constitution protects the minority. If the majority wants to vote, it can invoke cloture—try to. It takes 60 votes. No question about that. Then they can have the up-or-down vote that they want.

All the crocodile tears are being shed for this man who is fully employed downtown here with a big law firm, making hundreds of thousands of dollars a year. We are holding up the work of this country that deals with problems that people who do not make that kind of money have, people who are struggling to make sure they can pay their rent, make their house payment, pay their car payment, that they can find enough money to get to work on public transportation, people who need a minimum wage increase, people who have no health care; they cannot take their children to the hospital when they are sick, and if they do, they know they are going to be billed large sums. Some places do not have indigent hospital care. We know there are many people who are underinsured, as Senator KENNEDY and I talked about. There are 44 million who do not have health insurance. Those are the problems with which we should be dealing.

The Clark County School District in Las Vegas is the fifth or sixth largest school district in America. A quarter of a million children need help. The school district is in dire need of help. The Leave No Child Behind is leaving a lot of kids behind because there is no money to take care of the problems. We met with Governors today for lunch, and they were told when they met with the President yesterday for Leave No Child Behind they are supposed to do the testing, and if that does not work out, they are supposed to take care of the other problems. That is not the deal we made. The States were desperate before that was passed. We do not fund the IDEA act, children with disabilities. These are the issues we should be dealing with—not spending 3 weeks of our time on a man who is fully employed. Let's talk about some of the people who have no jobs or are underemployed.

Having said that, my friend, the distinguished senior Senator from Idaho, cannot understand why there is not a vote on Estrada the way he believes a vote should occur. My friend, the distinguished senior Senator from Idaho, voted against 13 Clinton nominees on the floor, including Rosemary Barkett, born in Mexico, who emigrated to the United States. She had a great rating from the ABA, before Fred Fielding was on the committee, and he does not write her evaluation report.

By the way, the one thing on which I agree with the Republicans: They were right in saying the ABA should be out of the process. I will join with anyone in the future to get the ABA out of the process. It is corrupt, unethical; there are absolute conflicts of interest. The Republicans were right; it has been unfair.

I cannot imagine that body having thousands of——

Mr. CRAIG. Will the Senator yield?

Mr. REID. In one second, I will yield—thousands of lawyers, and they cannot get people who would be fair and reasonable and do not appear to have conflicts of interest? It is ripe to get rid of it.

Mr. CRAIG. I would not deny the Senator the right to the floor. I am curious, for the 8 years of the Clinton administration, this was the gold plate. The American Bar Association quality test was a gold plate. I said wait a moment here and voted against some of them.

Mr. REID. I respond to my friend, I said on the Senate floor today in the presence of the chairman of the Judiciary Committee, they were right. I acknowledge that.

Mr. CRAIG. A year makes a lot of difference, in the opinion of the Senator?

Mr. REID. Knowledge makes a difference. I am not a member of the Judiciary Committee.

Mr. CRAIG. And I am a freshman there.

Mr. REID. I think the ABA should be ashamed of themselves.

I said this morning, I practiced law quite a few years before coming here. I was not a member of the ABA for a number of reasons. Had I known this, I would really not have been a member. Lawyers all over America—we have, going back to biblical times, had problems with lawyers.

Mr. CRAIG. That is why——

Mr. REID. The ABA, I cannot think of a better phrase than that they should be ashamed of themselves for what they have done.

This is off the subject, but I will get back on the subject. I believe all Presidents, Democrat and Republican, have had trouble getting nominees—whether it is Cabinet officers, sub-Cabinet officers, members of the military, whether it is judges—trying to get them before the Senate because of the length of time the FBI investigations take and all the hoops people have to jump through now.

I say let's eliminate the ABA from the judges. I don't know how many of my colleagues here agree, but I agree, and I will join with the Republicans anytime to get the ABA out of the process.

My friend, the distinguished Senator from Idaho, voted against Judge Sonia Sotomayor, the first Hispanic female appointed to the circuit, and Judge Richard Paez confirmed to the Ninth Circuit after 1,520 days following his nomination. In fact, the distinguished senior Senator from Idaho not only voted against Judge Paez's confirmation, before that vote on March 9, 2000, but also voted on that day to indefinitely postpone the nomination of Richard Paez.

I find it fascinating that someone who voted to indefinitely postpone a vote on Paez would now say that Estrada is entitled to an immediate vote on his nomination.

Mr. CRAIG. Will the Senator yield?

Mr. REID. I am happy to yield, although I do not lose my right to the floor.

Mr. CRAIG. Madam President, the Senator is absolutely right. I did vote against those judges, as I said on the floor a few moments ago. I voted for some of the Clinton judges and against some of them based on philosophy. The question I ask, though, is, Did I ever deny the Senate the right to go to a vote? Did I ever filibuster as the Senator's party is now doing on this issue?

Mr. REID. I say to my friend that we had to vote cloture on Paez. That is how we got a vote on Paez. That is how that came about. We had to invoke cloture, and we had enough people of goodwill on the other side of the aisle who joined with us to invoke cloture. So the debate stopped.

Mr. CRAIG. I see.

Mr. REID. Madam President, as I was saying before, the question was asked. Senator CRAIG voted against the motion to invoke cloture on the debate on Paez who was pending for more than 1,500 days.

I want everyone within the sound of my voice to hear this. As Senator DASCHLE and I said, when the Democrats took over control of the Senate, we said it is not payback time no matter how bad President Clinton was treated. And we could go into a long harangue about how unfair it was. I will not even mention a few of the judges. The record is replete with examples of how poorly they were treated and how unfairly they were treated. We did not have payback time when we were in the majority, and it is not payback time when we are in the minority.

We approved, during the short time that we had control of the Senate, 100

judges—exactly. Three judges have come before this body for a vote. They were approved unanimously.

The situation with Miguel Estrada is a little bit different. It is a little bit different. It is a lot different. It is tremendously different because this is a man about whom speeches have been given all over town. He is so good that he is going to go to the Supreme Court.

It triggered something in the mind of the members of the Judiciary Committee. If that is the case, maybe we should ask him some questions. My dear friend from Utah, from our sister State and neighboring State, had on his desk books—look at all the answers he has given. There are answers, and then there are answers. He didn't answer the questions. That was our concern. He responded to questions, but he didn't answer them.

We believe that what has gone on in the past is not something we want, so in this situation I am able to say here that 2 days ago everything has been said but not everyone has said it. We are in a new phase of this debate. Everything has been said and everybody has said it. So now it is just repeat time. I am going to do a little repeat time.

I know my friend from New York wishes to speak. I will be as quick as I can, but I do want to respond to some of the questions that have been raised in the last bit by my colleagues on the other side of the aisle.

In 1996, Republicans allowed no—zero percent, absolute number zero—circuit court nominees to be confirmed. In 1997, they allowed 7 of just 21 of President Clinton's 21 circuit court nominees, one-third. Only 5 of President Clinton's first 11 circuit nominees that same year were confirmed. In 1998, Republicans allowed 13 of the 23 pending circuit court nominees to be confirmed. That percentage was pretty good—the best year for circuit court nominations and 6.5 years in control of the Senate. In 1999, Republicans backed down to 28 percent and allowed 7 of the 25 circuit court nominees to be confirmed—about 1 of over 4.

Four of President Clinton's first 11 circuit court nominations that year were not confirmed. In 2000, Republicans allowed only 8 of 26, 31 percent. All but one of the circuit court candidates were initially nominated that year without confirmation.

Republicans simply have no standing to complain that 100 percent of President George W. Bush's circuit court nominees have not be confirmed. The recent issue makes it plain. Democrats have been far better to this President than they were to President Clinton.

Under Republicans, as a consequence, the number of vacancies on the circuit courts more than doubled—from 16 in January 1995 to 33 by the time the Senate was reorganized in the summer of 2001. Republicans allowed only 7 circuit court judges to be confirmed per year; on average, we confirmed 17 in just 17 months.

The other thing that I find so interesting is the majority is complaining about the District of Columbia Circuit Court being so understaffed. What they are saying now is that this DC Circuit is so understaffed that we have to do something about this.

As my friend from Utah said to me, make a difference. As I indicated to him about the ABA, I didn't know as much then as I know now about the ABA.

But what I wanted to talk about here is the DC Circuit Court problems. They talked about double standards on that side of the aisle today. Let me give you a couple of examples.

DC Circuit Court nominees Elena Kagan, Allan Snyder, and Merrick Garland. Senator CORNYN remarked that Judge Garland was confirmed in only a few months. Today the Senator repeated that claim using the chart that said Garland waited only 71 days from his nomination to confirmation.

If only that were the case, but all you have to do is talk to Judge Garland and look at the real record. Judge Garland was first nominated in 1995—the year the Republicans took over the Senate—and not allowed to be confirmed until 1997, hardly a few months.

The prior two Republican administrations under President Reagan and George W. Bush appointed 11 judges to the 12-member court. When President Reagan came to Washington, there was a concerted effort to pack this court in particular with activist judges in the hopes of limiting opportunity for citizens to challenge regulations and limiting constitutional power to enforce hard-fought constitutional and statutory rights to protect workers and to protect the environment.

President Reagan, with the help of the Senate, put activist Robert Bork on the DC Circuit. Like Miguel Estrada, Bork was one of the first judges nominated by that President. Shortly after winning Bork's confirmation to the circuit in 1982, President Reagan pushed through the Scalia nomination to the DC Circuit, and Ken Starr the following year.

That is a real lineup. Bork, Starr, Scalia—quite amazing. He named another five conservatives after that for a total of eight appointments to the court alone in his 8 years as President.

The first President Bush took a similarly special interest in the DC Circuit and chose Clarence Thomas to be one of his first dozen nominees. Thomas, who I had the pleasure of voting against when he came before the Senate, was one of two other nominees of the first President Bush. Four of the 11 judges put on the District of Columbia Circuit were later nominated by the Republican Presidents to the Supreme Court.

During the period when Republicans had nominations to that court—when Scalia and Thomas served there—the court, clearly any legal scholar can tell you, began to limit opportunities for individual citizens and judges to represent them. To have standing to challenge Government action.

At the same time, the DC Circuit became less deferential to agency regulations intended to protect consumers and workers. These decisions were praised by Republican activists.

With a Democratic Senate, President Clinton was able to name two moderate judges to this court in order to moderate this bench. However, once Republicans took over, they tried to prevent any more Democratic appointees from getting on this court.

So it is simply incorrect—and I hope not intentionally—to claim that Garland waited only 71 days between his nomination and his confirmation. It was a matter of years, not days—almost 2 years.

Why did he have to wait so long? Once Republicans took over the Senate, they decided to try to prevent President Clinton from filling circuit court vacancies, especially in the DC Circuit. In fact, during their time in the majority, vacancies on the appellate courts more than doubled, to 33, during their 6½ years in control of the Senate.

I believe Republicans decided to prevent President Clinton from bringing any balance to the DC Circuit. As you know, the Republicans had named 11 judges to this powerful 12-member court.

First, when Garland was nominated to the 12th seat, Republicans said the DC Circuit did not need a 12th judge. For example, the distinguished senior Senator from Iowa, Mr. GRASSLEY, said that this judgeship cost $1 million a year and did not need to be filled due to those costs.

Then Senator GRASSLEY said he was relying on the view of a Republican appointee to this court, Judge Silberman. Judge Silberman—you can read about him in a number of different places, including the book ''Blinded by the Right,'' written by Mr. David Brock, where this man, who was an activist for the far right, would meet with this judge, while he was sitting on the bench, walking to his anteroom, and talk about political strategy on how to embarrass Democrats, talk about political strategy, what to do to embarrass the President of the United States and the First Lady of the United States. That is Judge Silberman.

Judge Silberman recently told the Federalist Society that judicial nominees should say nothing in their confirmation hearings—the same advice he gave Scalia when Silberman was in the Reagan White House. And, as you know with Scalia, a nominee's silence on an issue certainly does not guarantee that a nominee does not have deeply held views on an issue.

Yesterday, I went into some detail about my respect for the ability of Judge Scalia to reason. This is a logical man, a brilliant man. But we, for various reasons, knew quite a lot about Scalia. He had written opinions before he went to the Supreme Court. And

even though some of us may not have agreed with his judicial philosophy, no one—no one—can dispute his legal attributes, his legal abilities, his ability to reason and think.

Scalia recently authored a majority opinion for the Supreme Court in favor of the Republican Party of Minnesota that ABA-modeled ethics rules could not prevent a judicial candidate from sharing his views on legal issues. That was Scalia, the person I just bragged about.

While there might have been some ambiguity about how much a judicial candidate could say before that Supreme Court decision last summer, after that decision there is none now, and Mr. Estrada has no ethical basis for refusing to answer the questions that we say he has not answered.

Let's talk about Silberman a little more.

He told Senator GRASSLEY that the addition of another judge on that court would make it ''more difficult'' ''to maintain a coherent stream of decisions.'' Surely he did not mean that the addition of a Democrat appointee to that court filled with Republican appointees would make it more difficult to have unanimous decisions by mostly Republican panels.

My friend Senator GRASSLEY and other Republicans also relied on the views of another Republican appointee, Judge J. Harvie Wilkinson of the Fourth Circuit. I don't know much about Harvie Wilkinson. I don't know if he is giving advice about how to embarrass Democrats in his judicial capacity, which is unethical and against the canons of judicial ethics. But I don't know anything about Harvie Wilkinson, other than what I am going to tell you right now. He said:

> [W]hen there are too many judges . . . there are too many opportunities for Federal intervention.

So this makes me think that the opposition to Garland getting a vote was pretty political.

Well, then look at what happened. Another Republican appointee to the DC Circuit retired, and then the Republicans said the DC Circuit did not need an 11th judge on that court. Garland would have then been the 11th judge instead of the 12th.

So the Republicans came to the floor stating that the declining caseload of the DC Circuit did not warrant the appointment of a Clinton appointee. They argued that 10 judges could handle the 1,625 appeals filed in the then-most-recent year for which statistics were available.

I can only imagine what the Republicans would be saying now if Gore—who got more votes in the last election than did the President—if he had won the Supreme Court case in that election recount. Now, the number of cases filed in the DC Circuit has fallen by another 200 per year, down to 1,400 in 2001, the most recent year for which statistics are available. So under their analysis—that is, the analysis of Silberman and Wilkinson—the DC Circuit would need only 9 judges to handle these cases, not 10 or 11 or 12.

In fact, under their analysis, 8 DC Circuit judges could probably handle the 1,400 appeals if each judge took a few more cases on average—175 rather than 162. In fact, the First Circuit had 1,463 appeals that year, more than the DC Circuit, but they only have 6 judges.

So let me be as clear as I can. I am not saying that the DC Circuit needs only eight judges and that Estrada and Roberts are people for whom they should not have submitted their names. I am simply saying that these were the Republican arguments against confirming Merrick Garland and any other Clinton appointees to that court. Now they are strangely silent on the plummeting caseload of the DC Circuit and whether it is important we spend $1 million per year for each job.

These saviors of the budget—the majority—and they are responsible, along with the President, for the largest deficit in the history of the world, almost $500 billion this year—are not concerned, I guess, about $1 million per year. Because you are talking about four judges or so, and that is only $4 million. And when we have a deficit approaching $500 billion, I guess that is chump change.

After delaying Garland from 1995 to 1997, 23 Republicans still voted against the confirmation of this uncontroversial and well-liked nominee. I think it is important note that, despite Garland's unassailed reputation for fairness, Republicans forced him to wait on the floor all this time—even after he was voted out of committee—11 months on the floor.

Clinton's two other nominees to the DC Circuit were not nearly as fortunate. Elana Kagan and Allen Snyder were never allowed a committee vote or a floor vote. They were held up by anonymous Republicans.

That is worse than what we are doing—absolutely, totally worse. What we are doing is within the rules because you have rules that you can follow. If it is not put out of committee, you have no recourse. If they had brought it to the floor, we could have at least tried to invoke cloture. And that is what the majority can do now.

They did not even give these two qualified people—both of whom graduated first in their class, Harvard—they were never even allowed a committee vote, or certainly not a floor vote. They were held up by anonymous Republicans.

Now, we are not doing anything in the dark of the night. We do not have anonymous holds on Miguel Estrada. We are out here on the floor saying, we want information on him. Until we get it, we are going to vote against this man. And I assume these anonymous holds—I don't know how many it was—one, or two, or three, or four, or five Republicans in the dark of the night preventing a vote.

Now the Republicans want to say it is wrong and unconstitutional to need 60 votes. It is not quite worth a hearty laugh, but it is sure kind of funny for them to say it is unconstitutional. Unconstitutional that we are following the Constitution—article II, section 2, of the Constitution?

Now Republicans want to say it is wrong and unconstitutional to need 60 votes—more than a majority—to end a debate under longstanding Senate rules, but it is not antidemocratic and unfair for Republicans to allow just one member of their own party—maybe two or three—to prevent a vote up or down on a judicial nominee, or at least allow us to file a motion to invoke cloture; that is, when a Democrat was President.

Madam President, I know the Senator from New York is here to speak. Is that true? I will have plenty of opportunity at a subsequent time to speak. But there will be a time when I respond to the statement the junior Senator from Texas made yesterday regarding the Senate's role on confirmations. I look forward to doing that.

I apologize to my friend from New York. She had duty here at 5 o'clock, and I have taken far too much time.

I did want to respond to some statements made when the Senator from New York was not on the floor. I felt it was important that the record be made clear.

The PRESIDING OFFICER. The Senator from Utah.

Mr. BENNETT. Madam President, I understand that the Senator from New York wishes to speak. I don't wish to delay her, but in the spirit of going back and forth, I have sought to be recognized. I will not take a great deal of time because I want to be sure the Senator from New York is given the proper opportunity to speak.

Mr. REID. Madam President, because of the graciousness of the Senator from Utah, I ask unanimous consent that following the statement of the Senator from New York, the Senator from Utah be recognized.

Mr. BENNETT. Madam President, I would object because I have the floor.

Mr. REID. I am sorry. I thought you were going to let her speak.

Mr. BENNETT. I do intend to let her speak, but I would like to give my statement first.

Mr. REID. I didn't understand that. Then I ask unanimous consent that the Senator from New York be recognized following the Senator from Utah. I would say to the Senator from Utah, the Senator from New York has been waiting a long time, so in the matter of who has been here the longest, it has been her.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BENNETT. I thank my friend from Nevada. I sit behind him. He may not have noticed how long I was waiting.

I have been interested in this debate. It goes on. As the Senator from Nevada

has said, just about everything that can be said has been said. But at the same time the country is beginning to discover this debate. While everything may have been said on the floor, it seems that not everything has been said out in the country. It is interesting to me that we are getting more and more editorial comment throughout the Nation on this issue.

One that came to my attention just this morning is in this morning's Washington Post. Those who get upset about what they believe is the liberal bias of the newspapers usually do not include the Washington Post among the list of those publications favorable to Republicans. There are columnists in the Washington Post that are considered favorable to Republicans. Mr. Novak comes to mind. But the Post itself is considered to be part of the leftwing media, according to those on talk radio.

So when someone who is part of the establishment of the Washington Post editorial page speaks out on this issue and says something contrary to that which is normally assumed to be the party line of the mainstream media, it is worth noting and commenting on.

In this morning's Washington Post, Benjamin Wittes, a member of the editorial page staff, has an op-ed piece entitled Silence is Honorable.

I would like to quote from it at some length. This is how Mr. Wittes begins:

Asked whether the Constitution evolves over time, the nominee to the U.S. Court of Appeals for the District of Columbia Circuit told the Senate Judiciary Committee that, while such debates were interesting, ''as an appellate judge, my obligation is to apply precedent.'' Asked whether he favored capital punishment, a nominee said only that the death penalty's constitutionality was ''settled law now'' and that he didn't ''see any way in which [his] views would be inconsistent with the law in this area.''

Miguel Estrada, one of President Bush's nominees to the D.C. Circuit, is facing a filibuster by Democratic senators who claim that his refusal to address their questions at his hearing—combined with the White House's refusal to release his memos from his days at the solicitor general's office—makes him an unreadable sphinx. Yet the careful answers quoted above are not Estrada's. The first was given by Judge Judith Rogers at her hearing in 1994, the second by Judge Merrick Garland the following year. Both were named to the bench by President Clinton. Neither was ever accused of stonewalling the committee. And both were confirmed.

But the rules they are a-changin', and answers barely distinguishable from these are no longer adequate. Asked whether he thought the Constitution contained a right to privacy, Estrada said that ''the Supreme Court has so held and I have no view of any nature whatsoever . . . that would keep me from apply[ing] that case law faithfully.'' Asked whether he believed Roe v. Wade was correctly decided, he declined to answer. While he has personal views on abortion, he said, he had not done the work a judge would do before pronouncing on the subject. Roe ''is there,'' he said. ''It is the law . . . and I will follow it.''

The real difference between Estrada's questioning and that of Garland and Rogers is not that Estrada held back. It is that Garland and Rogers faced nothing like the inquest to which Estrada was subjected. Both, along with Judge David Tatel—the other Clinton appointee now on the court—faced only a brief and friendly hearing.

I would note, outside of the article, that that brief and friendly hearing was under Republican auspices because Republicans controlled the Senate. Back to the article:

And none was pushed to give personal views on those matters on which his or her sense of propriety induced reticence. To be sure, there was no controversy surrounding the fitness of any of the Clinton nominees, so the situation is not quite parallel. When Garland, a moderate former prosecutor who had recommended the death penalty, said he could apply the law of capital punishment, there was no reason to suspect he might be shielding views that would make him difficult to confirm. By contrast, many Democrats suspect that Estrada's refusal to discuss Roe is intended to conceal his allegedly extremist views. But that only begs the question of why Estrada is controversial in the first place that Democrats think it appropriate to demand that he bare his judicial soul as a condition of even getting a vote.

This is the conclusion of this portion of the op-ed piece:

Nothing about his record warrants abandoning the respect for a nominee's silence that has long governed lower court nominations.

And silence is the only honorable response to certain questions. It is quite improper for nominees to commit or appear to commit themselves on cases that could come before them.

That is the end of that quote. This is the standard we followed in this body for many years. I will not pretend that members of the Judiciary Committee of both parties in Congress, controlled by both parties, would use the Judiciary Committee, the blue slip process and other patterns of senatorial courtesy to keep people from getting to the bench. That is part of our history. That has always been done. But once a hearing has been held and the committee has voted out a nominee, we have always allowed that nominee to go to a vote. That is the standard that has been established in this body. That is the standard that has been followed by Democrats and Republicans alike. And that is the standard that is being changed in this circumstance.

The Senator from Nevada talked a good bit about the Constitution and questions that have been raised about constitutionality by the Republicans. I would simply point out this obvious fact with respect to the Constitution on this question: The Founding Fathers gave the power to advise and consent in certain executive decisions to the Senate. The Founding Fathers recognized that the power to advise and consent was a very significant one, an unusual one held solely to the Senate. So they outlined those areas where the power to advise and consent would require a supermajority.

The Founding Fathers said: If you are advising and consenting on a treaty, which becomes law when it is ratified, equal to the Constitution, then you have to have a two-thirds majority. If you are amending the Constitution, you have to have a two-thirds majority. These are serious enough matters, with long-term impact, that they must have a two-thirds majority.

They could have said: The advise and consent power always requires a supermajority, but they did not. The Founding Fathers made it very clear those specific areas where a supermajority would be required and then left it to an ordinary majority on the advise and consent power with respect to Presidential nominations. And throughout the entire history of the Republic, we have followed the pattern of a simple majority for the advise and consent power to be exercised by the Senate.

Make no mistake, if the Senate sets the precedent in the Estrada case that the advise and consent power from this time forward requires a supermajority of 60 votes, they are changing forever the pattern of the Senate's relationship to the executive branch in this area. I am not one who says that is unconstitutional. I think it is within the power of the Senate. I disagree with those who are saying it violates the Constitution. I think it violates the intent of the Framers of the Constitution. I think that is very clear. But it is within the power of the Senate to do that if we want.

As I have said before, we on our side of the aisle discussed this when we were faced with those nominees from President Clinton whom we considered controversial. There were those in our conference who insisted that we must do that—change the pattern and require President Clinton's nominees to pass the 60 point bar. To his credit, my senior colleague from Utah argued firmly against that. Even though he was against the nominees in some cases, he said we must not change the historic pattern that says once a nominee is voted out of the committee, he or she gets a clear up-or-down vote by a majority. To his credit, the Republican leader at the time, the majority leader, Senator LOTT, said exactly the same thing: We must not go down that road. Those in our conference who said let's do it on that particular judge agreed and backed down, and no matter how strongly people on this side of the aisle felt about a particular judge, there was never an attempt to use the filibuster power to change what we considered to be the clear intent of the Founding Fathers and change the advise and consent situation, where there was an additional supermajority required, an additional supermajority added to that which the Founding Fathers themselves wrote into the Constitution.

Now the Democrats have decided they are going to do that. It is their right. To me, it signals a determination on their part that they expect to be in the minority for a long time. One of the reasons Senator HATCH gave for us not to do it was, we will have an opportunity in the future to be voting on nominees offered by a President of our

own party, and if we do this to the other party, they will then feel comfortable in doing it to the nominees of our party; let's just not do that.

I think by deciding to do this on this nominee, the Democrats have virtually conceded the fact that they do not expect another Democratic President for long time. They believe they will be in the minority for a long time and, therefore, they must establish this weapon as one of the weapons they will use as part of the minority to obstruct the activities in the Senate for a long time to come.

I hope they decide ultimately to bet on the future. I hope they decide ultimately they do expect that there will be a Democratic President sometime in the future, that they do expect there will be a Democratic Senate sometime in the future and they want to save for the future the right that every President, Democrat or Republican, and every Senate, Democrat or Republican, has maintained since the founding of the Republic 2½ centuries ago.

Madam President, if I may go back to the article written by Benjamin Wittes in this morning's Washington Post that summarizes the implications of going in this direction and what it will do long term, he says:

> Not knowing what sort of judge someone will be is frustrating, but that is the price of judicial independence. While it would be nice to know how nominees think and what they believe and feel, the price of asking is too high. The question, rather, is whether a nominee will follow the law. Estrada has said that he will. Those who don't believe him are duty bound to vote against him, but they should not oblige nominees to break the silence that independence requires.

That is what our friends on the Democratic side are doing. They have never demanded it before. We did not demand it of their nominees. They are changing the rules—''the rules they are a'changing,'' as Mr. Wittes points out. I ask my friends on the Democratic side to think long and hard about the long-term consequences of changing the rules—changing the rules, as Mr. Wittes talks about it, in terms of what is demanded of nominees; changing the rules as we are talking about it here in terms of the supermajority that would be added to the existing constitutional requirement of the Senate as it performs its role in advising and consenting to executive nominations.

With that, I yield the floor.

The PRESIDING OFFICER. The Senator from New York is recognized.

Mrs. CLINTON. Madam President, I thank the Senator from Utah for his kindness and consideration with respect to the order. I was happy to have the opportunity to hear him, as I often am.

With respect to the arguments that have been made in the last hour or so, I think it is clear that there is a fundamental difference of opinion regarding the Senate's obligation and duty under the advise and consent clause of the U.S. Constitution.

Mr. DORGAN. Will the Senator yield for a unanimous consent request?

Mrs. CLINTON. Yes.

Mr. DORGAN. I ask unanimous consent that I may speak following the speech of the Senator from New York.

Mr. BENNETT. I object. There is a Republican speaker coming. I would amend the UC request to say that Senator TALENT, if he is on the floor, be recognized first, and then Senator DORGAN be recognized.

The PRESIDING OFFICER. Is there objection?

Mr. DORGAN. Reserving the right to object, I have not followed the order on the floor of the Senate today. I don't know whether the Senator from Utah has. I was told I would be recognized at 5:30 and was prepared to do that. If there has been a process today in which Republicans and Democrats follow each other precisely, then I will understand what the Senator from Utah is trying to do. If not, I am here. The reason I am here is to present remarks following the Senator from New York. If others wish to be involved in the lineup, I will be happy to entertain that. I guess I don't understand the circumstance under which the Senator from Utah is opposing this.

Mr. BENNETT. I am not sure what the circumstance was prior to my coming to the floor either. I was told we were going back and forth. If I might inquire as to how much time the Senator would use, perhaps there would be no problem.

Mr. DORGAN. It was my intention to consume an hour, but I will not do that; it will be a half hour. I would certainly be accommodating to anybody else. I would like to speak, and others are not here. I don't intend to interrupt. If there is an order established, I do not want to interrupt that. I don't know that to be the case.

Mr. BENNETT. I don't know that to be the case all day long. I do know that was the case earlier. Reserving the right for my friend who is anticipating to be here at 6, and was told in advance he could be here at 6, I renew my unanimous consent request that following the Senator from New York, the Senator from Missouri, Mr. TALENT, would be recognized to speak, after which the Senator from North Dakota, Mr. DORGAN, would be recognized.

The PRESIDING OFFICER. Is there objection?

Mr. DORGAN. Reserving the right to object—and I will now object—if the other side wishes to protect people who are not here in deference to those who are here, I expect the Senator from Utah would want us to do the same thing on this side of the aisle. If a Republican is waiting to speak, and a Democrat is not yet on the floor, but someone here says it is really the opportunity for the Democrats to speak even if the Republican is here, we will object. So I guess I understand the point the Senator from Utah is making. I will not object to his request as long as he understands that we will do that, I suppose. I don't think it is the most efficient way of handling things. Those who are on the floor and prepared to speak, I expect that is the way we ought to recognize people.

Mr. BENNETT. I thank my friend for his consideration. I say to him he caught me at somewhat of a disadvantage in that I am the only one on the floor and didn't know what was going on. I am trying to accommodate people on both sides, which is why I want to make sure the Senator from North Dakota is recognized to speak.

Mr. DORGAN. Madam President, continuing to reserve the right to object, if this is the process, I will simply at some appropriate point ask for a time certain to speak tomorrow and will be here promptly at that time. I am here now and those who the Senator from Utah is attempting to protect are not here. I will not object because I do not want to interrupt an order apparently they think on that side exists. If that, in fact, is the order, we will certainly make sure that is the case for people on both sides of the aisle as we proceed.

Mr. BENNETT. I would expect the Democratic leader to be sure of enforcing the same process on behalf of Senators on his side of the aisle.

Mr. DORGAN. Madam President, I do not think that is the most efficient use of time in the Senate. It seems to me those who are here want to be recognized to proceed. Recognizing it is not the most efficient use of time, I will not object to the request by the Senator from Utah.

Mr. BENNETT. I thank my friend.

The PRESIDING OFFICER. Without objection, it is so ordered. The Senator from New York.

Mrs. CLINTON. I thank the Chair. Madam President, I have been, as I said, listening with great interest to the debate on this issue. It is a very significant and important debate. As I often do when I come to the Chamber, I imagine, instead of being a Senator with the great honor of representing the State of New York and speaking in this Chamber, that I am just another citizen, as I have been most of my life, watching the debate on C–SPAN or one of the other television networks that might cover parts of it, and I would be asking myself: What is this all about? Why has so much time been consumed in the Senate over this one nominee?

The bottom line answer is that this side of the aisle has a very deep concern about any candidate seeking a lifetime position who refuses to answer the most basic questions about his judicial philosophy. And that, in fact, to permit such a candidate to be confirmed without being required to answer those questions is, in our view, a fundamental denial and repudiation of our basic responsibilities under the advice and consent clause of article II, section 2, of the U.S. Constitution.

Earlier this afternoon, as I was waiting for my opportunity to speak, I heard the Senator from Idaho admit that he had, based on philosophy, voted against certain nominees who had been sent to the Senate by President Clinton. I happen to think that is a totally

legitimate reason to vote for or against a nominee. I happened to agree with the Senator from Idaho when he said he voted against nominees by President Clinton based on philosophy. That is an integral part of the advise and consent obligation.

The problem that we have on this side of the aisle is we cannot exercise the advise and consent obligation because we do not get any answers to make a determination for or against this nominee based on philosophy. I could not have done a better job than the Senator from Idaho did in summing up what the problem is. I thank the Senator from Idaho for being candid, for saying he voted against President Clinton's nominees based on philosophy.

We could resolve this very easily if the nominee would actually answer some questions, legitimate questions that would permit those of us who have to make this important decision and are not just saluting and following orders from the other end of Pennsylvania Avenue, by being able to look into the philosophy and then deciding: Are we for this nominee or are we against this nominee?

This nomination would also be expedited if the President and his legal counsel would respond to the letter of February 11 sent to the President by the minority leader and the distinguished ranking member of the Judiciary Committee asking for additional information on which to make a decision concerning this nominee, and, in fact, both Senators Daschle and Leahy are very explicit about what information is required. I will reiterate the request. Specifically, they asked the President to instruct the Department of Justice to accommodate the request for documents immediately so that the hearing process can be completed and the Senate can have a more complete record on which to consider this nomination and, second, that Mr. Estrada answer the questions he refused to answer during the Judiciary Committee hearing to allow for a credible review of his judicial philosophy and legal views.

I would argue, we are not changing the rules. In fact, we are following the rules and the Constitution, and we are certainly doing what the Senator from Idaho said very candidly he did with respect to President Clinton's nominees. We are trying to determine the judicial philosophy of this nominee in order to exercise our advise and consent obligation.

I have also been interested in my friends on the other side of the aisle talking and reading from newspapers and asserting that we are somehow requesting more information from this nominee than from other nominees and that, in fact, it is honorable not to answer relevant questions from Judiciary Committee members. It may be honorable by someone's definition of honor, but it is not constitutional. It is fundamentally against the Constitution to refuse to answer the questions posed by a Judiciary Committee member.

If there were any doubt about this standard, all doubt was removed last year. How was it removed? It was removed in a Supreme Court opinion rendered by Justice Scalia arising out of a case brought by the Republican Party concerning the views of judges.

For the record, I think it is important we understand this because perhaps some of my colleagues have not been informed or guided by the latest Supreme Court decisions on this issue, but I think they are not only relevant, they are controlling, to a certain extent, when we consider how we are supposed to judge judges.

Republicans focus on the ABA model code that judicial candidates should not make pledges on how they will rule or make statements that appear to commit them on controversies or issues before the court. They are, understandably, using this as some kind of new threshold set by Mr. Estrada who refused to answer even the most basic questions about judicial philosophy or his view of legal decisions.

Some judicial candidates, it is true, go through with very little inquiry. They come before the Judiciary Committee. They are considered mainstream, noncontroversial judges. Frankly, the Senators do not have much to ask them. They go through the committee. They come to the floor. That is as it should be. Were it possible, that is the kind of judge that should be nominated—people whose credentials, background, experience, temperament, and philosophy is right smack in the center of where Americans are and where the Constitution is when it comes to important issues. When someone does not answer questions or when they are evasive, it takes longer and you keep asking and you ask again and again. That was, unfortunately, the case with this particular nominee.

The Republican Party sued the State of Minnesota to ensure their candidates for judicial office could give their views on legal issues without violating judicial ethics. Republicans took that case all the way to the Supreme Court. In an opinion by Justice Scalia, the Supreme Court ruled that the ethics code did not prevent candidates for judicial office from expressing their views on cases or legal issues. In fact, Justice Scalia said anyone coming to a judgeship is bound to have opinions about legal issues and the law, and there is nothing improper about expressing them.

Of course, we do not and should not expect a candidate to pledge that he is always going to rule a certain way. We would not expect a candidate, even if he agreed that the death penalty was constitutional, to say: I will always uphold it, no matter what. That would be an abuse of the judicial function and discretion.

Specifically, in Republican Party of Minnesota v. White, the Supreme Court overruled ABA model restrictions against candidates for elective judicial office from indicating their views. I think the reasoning is applicable to those who are nominated and confirmed by this body for important judicial positions within the Federal judiciary.

Justice Scalia explained in the majority opinion, even if it were possible to select judges who do not have preconceived views on legal issues it would hardly be desirable to do so.

I want my friends on the other side to hear the words of one of the two favorite Justices of the current President, Justice Scalia: Even if it were possible, it would not be desirable.

Why? Because, clearly, we need to know what the judicial philosophy is. Judges owe that to the electorate, if they are elected; to the Senate if they are appointed.

Justice Scalia goes on: Proof that a justice's mind at the time he joined the court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias. And since avoiding judicial preconceptions on legal issues is neither possible nor desirable, pretending otherwise by attempting to preserve the appearance of that type of impartiality can hardly be a compelling State interest, either. In fact, that is Justice Scalia quoting Justice Rehnquist.

Before this decision, some judicial candidates may have thought—and some of my colleagues may have thought—that judicial candidates could not share their views on legal issues, and I think that might have been a fair assessment of the state of the law at that time. But that is no longer a fair assessment.

A judicial candidate cannot be compelled to share his views, but Justice Scalia tells us that a judicial candidate who does not share his views refuses to do so at his own peril, and that is exactly what this nominee has done. At his own peril, he has gotten his marching orders from the other end of Pennsylvania Avenue, from all those who advise judicial nominees, from the Federalist Society and all the rest of those organizations, not to answer any questions, to dodge all of the issues, to pretend not to have an opinion about any Supreme Court case going back to Marbury v. Madison.

Well, he does so, in Justice Scalia's words, at his peril. That is what has brought this nomination to this floor for all these days, because this nominee wants to be a stealth nominee. He wants to be a nominee who is not held accountable for his views so that we who are charged under the Constitution to make this important judgment cannot do so based on his judicial philosophy.

Justice Scalia has a lot to say to my friends on the other side. If it were possible to become a Federal judge, with lifetime tenure, on the second highest court of the land, without ever saying

anything about your judicial philosophy, I think that would be astonishing. It would be troubling. It would run counter to the Constitution and to this opinion written by one of the most conservative members of the current Court.

Mr. Estrada basically has come before this Senate and claimed he cannot give his view of any Supreme Court case without reading the briefs, listening to the oral argument, conferring with colleagues, doing independent legal research, and on and on. That is just a dressed up way of saying: I am not going to tell you my views, under any circumstances.

One has to ask himself—and I do not want to be of a suspicious mindset—why will this nominee not share his views? Are they so radical, are they so outside the mainstream of American judicial thought, that if he were to share his views, even my friends on the other side would say wait a minute, that is a bridge too far; we cannot confirm someone who believes that?

How can I go home and tell my constituents that I voted for somebody who actually said what he said? I cannot think of any other explanation. Why would a person, who clearly is intelligent—we have heard that constantly from the other side—who has practiced law, not be familiar with the procedures of the Judiciary Committee, of the constitutional obligation of advise and consent or even of Justice Scalia and Justice Rehnquist's opinions about the importance of answering such questions?

So I have to ask myself: What is it the White House knows about this nominee they do not want us to know? And if they do not want us to know, they do not want the American people to know. I find that very troubling.

I do not agree with the judicial philosophy of many of the nominees sent up by this White House. I voted against a couple of them. I voted for the vast majority of them, somewhere up in the 90 percentile. At least I felt I could fulfill my obligation so when I went back to New York and saw my constituents and they asked why did I vote for X, I could say to them it was based on the record. He may not be my cup of judicial tea, but he seems like a pretty straightforward person. Here is what he said and that is why I voted for him. Or to the contrary, I could not vote for this nominee because of the record that was presented.

I cannot do that with this particular nominee. And you know what. The other end of Pennsylvania Avenue that is calling the shots on this nomination does not want me to have that information.

I think that is a denial of the basic bargain that exists under the Constitution when it comes to nominating and confirming judges to the Federal courts.

It could have been different. The Founders could have said let's put all of this into the jurisdiction of the Executive; let him name whoever he wants. Or they could have said: No, let's put it in the jurisdiction of the legislature; let them name whoever they want. Instead, as is the genius of our Founders and of our Constitution, there was a tremendous bargain that was struck, rooted in the balance of power that has kept this Nation going through all of our trials and tribulations, all of our progress, that balance of power which said we do not want this power to rest in any one branch of Government; we want it shared. We want people to respect each other across the executive and legislative lines when it comes to the third branch of Government.

So, OK, Mr. President, you nominate. OK, Senators, you advise and consent. That is what this is about.

Sometimes I wonder, as my friends on the other side talk about it, how they can so cavalierly give up that constitutional obligation. The unfortunate aspect of this is we could resolve this very easily. All the White House has to do is send up the information. Let Mr. Estrada answer the questions. He may still have a majority of Senators who would vote to put him on the DC Circuit. I do not know how it would turn out because I do not have the information.

While we are in this stalemate caused by the other end of Pennsylvania Avenue, which for reasons that escape me have dug in their heels and said, no, they will not tell us anything about this person, there is a lot of other business that is not being done, business about the economy, the environment, education and health care, business that really does affect the lives of a lot of Americans.

On that list of business that I consider important is what is happening in our foster care system. Tomorrow evening, I will have the great privilege of hosting the showing of a tremendous movie about the foster care system, along with Congressman TOM DELAY. I invite all of my colleagues from both Houses of Congress to come and see this movie that vividly illustrates what happens in our foster care system.

I have worked in the past with Congressman DELAY to try to improve the foster care system. I look forward to doing that in the future. He has a great commitment to the foster care system and the foster children who are trapped within it. I use that word with great meaning because, indeed, that is often what happens to them. And the stories of abuse and neglect that first lead children to go into the foster care system are compounded by the stories of abuse and neglect once they are in that system.

Mr. Fisher will be joining Congressman DELAY and me at the Motion Picture Association screening room for this important movie. This is a screening just for Members of Congress. I think it will illustrate better than certainly my words could why it is so important we join hands and work on this issue along with many others who affect the lives of children as well as men and women across America.

Occasionally, a movie comes to the screen that brings to life the stories that have become routine in the newspapers and that we too often ignore—the stories of children living with abuse and neglect, shuffled in and out of our foster care system, often with little guidance from or connection to any one adult. Too often these stories end in the most tragic way possible:

7-year-old Faheem Williams in Newark, NJ was recently found dead in a basement with his two brothers where they were chained for weeks at a time.

6-year-old Alma Manjarrez in Chicago was beaten by her mother's boyfriend and left to die outside in the snow and cold of the winter.

And despite 27 visits by law enforcement to investigate violence, 7-year-old Ray Ferguson from Los Angeles was recently killed in the crossfire of a gun battle in his neighborhood.

Antwone Fisher's story is different.

Mr. Fisher overcame tremendous odds: He was born in prison, handed over to the State, and lived to tell his story of heartbreaking abuse. At the age of 18, he left foster care for the streets. With nowhere to turn, he found the support, education, and structure in the U.S. Navy. In the Navy, Fisher received a mentor and professional counselor, which helped him turn his life around.

Mr. Fisher survived his childhood and has lived to inspire us all and send us a stern reminder that it is our duty to reform the foster care system so that no child languishes in the system, left to find his own survival or to die. Antwone's success story should be the rule not the exception.

Tomorrow night, House Majority Leader TOM DELAY and I will be cohosting a screening of the movie ''Antwone Fisher'' for Members of Congress. We decided to host this together because we both feel that it is imperative that we raise national awareness about foster care—through one child's own experience—and encourage our colleagues to tackle this tough issue with us.

Congressman DELAY and I had received an award together in the year 2000 from the Orphan Foundation of America for the work that we both have done in this area. Earlier this year, I asked my staff to reach out to his staff to find ways we might work together to focus on this issue. This movie was a natural fit for both of us and I look forward to continuing to work with Representative DELAY as we take a hard look at reforming our foster care system. Congressman DELAY and his wife, Christine, are strong advocates for foster children and are foster parents themselves.

I hope that many of my colleagues in the Senate will take us up on the invitation and join us for this important movie.

But, for those who can't join us, I wanted to share a little bit about Antwone's story in his own words from his book, ''Finding Fish''—

The first recorded mention of me and my life was [from the Ohio State child welfare records]: Ward No. 13544.

Acceptance: Acceptance for the temporary care of Baby boy Fisher was signed by Dr. Nesi of the Ohio Revised Code.

Cause: Referred by division of Child Welfare on 8–3–59. Child is illegitimate; paternity not established. The mother, a minor is unable to plan for the child. The report when on to detail the otherwise uneventful matter of my birth in a prison hospital facility and my first week of life in a Cleveland orphanage before my placement in the foster care home of Mrs. Nellie Strange.

According to the careful notes made by the second of what would be a total of thirteen caseworkers to document my childhood, the board rate for my feeding and care cost the state $2.20 per day.

Antwone went on to document that the child welfare caseworker felt that his first foster mother had become ''too attached'' to him and insisted that he be given up to another foster home. The caseworker documents this change:

Foster mother's friend brought Antwone in from their car. Also her little adopted son came into the agency lobby with Antwone. . . . They arrived at the door to the lobby and the friend and the older child quickly slipped back out the door. When Antwone realized that he was alone with the caseworker, he let out a lust yell and attempted to follow them.

Caseworker picked him up and brought him in. Child cried until completely exhausted and finally leaned back against caseworkers, because he was completely unable to cry anymore.

Later he describes when the caseworker brought him to his next foster home—she too slipped out the door when he was not looking. He says, ''All through my case files, everybody always seemed to be slipping away in one sense or another.''

When Antwone arrived at the next foster home and as he grew, at first he was not told of his troubled entry into the world:

But for all that I didn't know and wasn't told about who I was, a feeling of being unwanted and not belonging had been planted in me from a time that came before my memory.

And it wasn't long before I came to the absolute conclusion that I was an uninvited quest. It was my hardest, earliest truth that to be legitimate, you had to be invited to be on this earth by two people—a man and a woman who loved each other. Each had to agree to invite you. A mother and a father.

Antwone Fisher never knew a permanent home—never knew a loving mother and father. Instead, he was left to fend for himself when he was expelled from foster care at 18—a time when the state cuts off payments to foster parents. Antwone found himself on the streets and homeless.

Thanks to the work of many on both sides of the aisle in Congress we have begun important work to make sure that Antwone's story is not repeated. No child should have to grow up in foster care from birth and never be adopted and no child should ever have to leave the system at 18, with absolutely no support.

There are approximately 542,000 children in our Nation's foster care system—16,000 of these young people leave the system every year having never been adopted. They enter adulthood the way they lived their lives, alone.

In 1999, when I was First Lady, I advocated for and Congress took an important step to help these young adults by passing the Chafee Foster Care Independence Act. This program provides states with funds to give young people assistance with housing, health care, and education. It is funded at $410 million annually, and should be increased. But it was an important start to addressing the population of children who ''age-out'' of our foster care system.

This bill came after the important bipartisan Adoption and Safe Families Act of 1997. As First Lady, it was an honor to work on what's considered to be one of the most sweeping changes in federal child welfare law since 1980.

It ensured that a child's safety is paramount in all decisions about a child's placements. For those children who cannot return home to their parents, they may be adopted or placed into another permanent home quickly. Since the passage of this law, foster child adoptions have increased by 78 percent.

The next major hurdle that I believe we need to tackle in reforming our child welfare system is the financing system.

Currently, we spend approximately $7 billion annually to protect children from abuse and neglect, to place children in foster care, and to provide adoption assistance. The bulk of this funding, which was approximately $5 billion in fiscal year 2001, flows to States as reimbursements for low-income children taken into foster care when there is a judicial finding that continuation in their home is not safe.

This funding provides for payments to foster families to care for foster children, as well as training and administrative costs.

This funding provides a critical safety net for children, who through difficult and tragic circumstances end up in the care of the state. It ensures that children are placed in foster care only when it is necessary for their safety, it ensures that efforts are made to reunify children with their families as soon as it safe, it works to make sure that the foster care placement is close to their own home and school, and it requires that a permanency plan is put in place. All of these safeguards are critical.

The financing, however, is focused on the time the child is in foster care and it continues to provide funding for States the longer and longer a child is in the system. The funding is not flexible enough to allow for prevention or to help children as they exit the system—critical times when children fall through the cracks.

President Bush has put a proposal on the table to change the way foster care is financed in order to provide greater flexibility so that states can do more to prevent children form entering foster care, to shorten the time spent in care, and to provide more assistance to children and their families after leaving.

While I absolutely do not support block granting our child welfare system—I do think that it is important that President Bush has come to the table with an alternative financing system and I believe that it provides us with an opportunity to carefully consider how to restructure our child welfare system.

We must ask critical questions:

Will States be required to maintain child safety protection that we passed as part of the Adoption and Safe Families Act?

Will States be required to target funds to prevention and post-foster care services?

What happens if there is a crisis and more foster care children enter the system? Will States receive additional funds?

While I believe all of these questions deserve answers, I applaud President Bush and Representative DELAY for being willing to tackle this hard problem. I look forward to working with them to find solutions so that we do not allow any child to fall through the cracks.

This is just one of the many issues that are basically left on the back burner while we engage in this constitutional debate that could be resolved if information were provided.

As I said, I have to question the reasons why that information is not forthcoming. It gives me pause. This administration is compiling quite a record on secrecy. That bothers me. It concerns me. I think the American people are smart enough and mature enough to take whatever information there is about whatever is happening in the world—whether it is threats we may face or the judicial philosophy of a nominee. That is how a democracy is supposed to work. If we lose our openness, if we turn over our rights to have information, we are on a slippery slope to lose our democracy. Now, of course, in times of national crisis and threat like we face now, there are some things you cannot share with everyone. But you certainly can and should share them with the people's elected representatives. That is why we are here. I err on the side of trying to make sure we share as much information as possible.

For the life of me, I cannot understand why the White House will not share information about this nominee. Until it does, until Mr. Estrada is willing to answer these questions, I have to stand with my colleague from Idaho—I cannot cast a vote until I know a little bit more about the judicial philosophy. This is not a Republican or Democratic request. This is a senatorial request.

This is what the Senate is supposed to be doing.

I urge our colleagues and friends on the other side of the aisle, do whatever you can to persuade the White House and the Justice Department to level with the Senate, to level with the American people, to provide the information that will enable us to make an informed decision and fulfill our constitutional responsibility.

It seems to me to be the very minimum we can ask. It certainly is what has been provided and asked for in the past. I hope it will be forthcoming, that the letter sent by Senators DASCHLE and LEAHY will get a favorable response, we will be able to get the information the Judiciary Committee has requested, that many Members feel we need, and we can move on. We can tend to the people's business, including the need to reform our foster care system to try to save the lives of so many children who would otherwise be left behind and left out of the great promise of America.

The PRESIDING OFFICER (Mr. ALEXANDER.) The Senator from Missouri.

Mr. TALENT. When I was growing up, there was a tradition in the Senate that I observed as an outsider, of course, about how the Senate handled its constitutional function of giving advice and consent for presidential nominees. The Senate pretty much understood on the basis of a bipartisan consensus that its role was secondary, that its power was a check rather than a primary power to appoint people, either to the executive branch or to the judicial branch. I observed that Senators pretty much voted to confirm Presidential nominees if they believed those nominees were competent and if they believed those nominees were honest, and they did not inquire too greatly of the nominees' philosophy for the executive or into the nominees' jurisprudence for the legislative. There would be flaps or personal problems, but basically that was the role the Senate played and the traditional understanding of its constitutional function.

Unfortunately, I think we will all agree, that consensus has broken down over the last few years. We will all agree that both sides have some responsibility for that consensus breaking down. What we are experiencing now from the Senators who are opposing and filibustering the Estrada nomination is so extreme given the past traditions of the Senate that it threatens the spirit and, I argue, even the letter of the Constitution, and it threatens the ability of the Senate and the integrity of the Senate to do the work of the people.

Let me go into that a little bit. First of all, I take it from my understanding of the debate that the Senators who are opposing Mr. Estrada are not questioning his abilities as a lawyer or his honesty or integrity as an individual. I appreciate that. This is not a personal attack on Mr. Estrada. No one is saying he is unqualified as a lawyer. No one is saying he is dishonest in terms of his professional dealings or dishonest as a man and, indeed, you could not say that based on his experience which is clearly well known after the hours of debate we have put into this nomination.

He arrived in this country knowing very little English. He worked his way up, if you will. He was a leader in his law school class. He was on the Law Review. An achievement he was able to get, as not all of us were able to get, he clerked for an outstanding judge, a Democratic appointee on the Second Circuit, and then on the Supreme Court, and did an outstanding job in the Solicitor General's Office, according to his supervisors of both parties.

No one is questioning his abilities or honesty, as I understand it. As I understand, no one is saying they think he is not competent or honest in the sense of the standard that traditionally had been applied. What they are saying is this. They are saying, first of all, they will vote against the nominee, even to an appellate court, because they disagree with that nominee's jurisprudence, which is, itself, a step beyond what the Senate ever did in the past. But they are going beyond that. They are saying they will vote against the nominee, even to an appellate court, not just because they disagree with his jurisprudence, but because they suspect they might disagree with his jurisprudence.

And if he answered questions no other nominee who worked for the Solicitor General's Office has ever been expected to answer, and which they should not have to answer, given the need for the integrity of the executive branch, but they are going beyond that.

The opponents on this floor of the Estrada nomination are not just saying they will vote against nominees if they disagree with their jurisprudence, or vote against them if they suspect they might disagree with their jurisprudence; they are saying they are not even going to allow a vote on a nominee even to an appellate court if they suspect they might disagree with that nominee's jurisprudence.

I ask my colleagues, I beg my colleagues who are opposing this nomination, to consider what this new standard, if it were to be adopted by the Senate as a whole, would mean for the Constitution, would mean for the Senate, and would mean for Estrada, as well.

As I said, the Constitution assigned, we can all agree, the primary power of appointment to the President. Yet the Constitution shares some of that power with the Senate and that is not unusual. Even though we have a separation of powers, there are a number of instances where the executive is given a little legislative power, or the legislative is given a little executive power. For example, when the President is given the power to negotiate treaties and conclude them with foreign countries but subject to the requirement that two-thirds of the Senate ratify those treaties. So the Senate is given, in effect, a little executive power.

The Framers of the Constitution knew how to provide for the Senate to exercise the executive power they gave it by a supermajority vote when they wanted to provide that.

When the Framers said, we want to actually take a little bit more power away from the President, they said, we are not only going to require that the Senate ratify treaties but we are going to require that they ratify them by a supermajority vote, a two-thirds vote. The Framers knew how do to that when they wanted to do it. The assumption is they didn't want to take that extra measure of power away from the executive. Yes, they wanted to share the power of appointments with the Senate, as several colleagues have said. They are correct in saying that. The Senate is a partner in this process. But according to its traditions, it has always been a junior partner. According to the spirit of the Constitution, it exercises this partnership by a majority vote and not a supermajority vote.

If we adopt the tradition in this body that we will filibuster nominees, if we suspect we might disagree with their jurisprudence, we are in effect saying it will require 60 votes for this body to confirm a judicial nomination. That, I submit to you, is a usurpation of the executive authority as granted under the Constitution. It is a shift in constitutional authority away from the executive and to the legislature—and not even to the Congress as a whole but to the Senate.

As much as I stand up for the Senator from New York in saying as much as we have to stand up for the prerogatives and the authority of the Senate under the Constitution, our first responsibility is to the Constitution and to the distribution of powers, as the letter of the Constitution indicates and as the traditions of this Senate have always confirmed.

I am deeply concerned. If we were to adopt the standards being applied here to Miguel Estrada across the board, we would be doing something which is unconstitutional and which violates the spirit and I believe the letter of the Constitution as well.

My second concern is that this kind of a filibuster under these circumstances will poison the operation of the Senate on other matters. The filibuster, whatever you think of it, is a power that should be reserved for issues of only the greatest seriousness. I am not saying an appellate court nomination isn't important, it is important, but it is an appellate court nomination. Mr. Estrada, if he is confirmed to this post, whatever my colleagues may suspect his jurisprudence might lead him to do, is not going to change settled interpretations of the Constitution of the United States that can only occur on the Supreme Court level. And to haul out the nuclear

weapon, if you will, of a filibuster on an issue that, while important, is not of the first letter of importance undermines the integrity and the ability of this Senate to pull together on issues that are of the first importance.

I agree with the Senator from New York. We need to get on to issues of health care. We need to get on to issues of education. We need to get on to issues of defense and of tax relief to create jobs. All of these things are very important. That is why we should not filibuster an appellate court nomination. Allow a vote at least, I ask my colleagues.

Let me say finally that I am concerned about the effect of this on the justice that we as a body and as Americans owe to the man whose interests and whose career are at stake here. Miguel Estrada is, after all, a person. Sometimes the great forces of history, of cultural division, and focus on personal disputes involving broader issues come to focus on one man or one woman. We have seen that happen sometimes in our history. And it may be unavoidable. But we should always keep in mind that we are dealing with a human being, a person who has done his best by his life to keep his obligations to his colleagues and to his country—a person who has excelled by any standard. None is questioning that—a person who has conducted himself with integrity and has done so in a town where it is sometimes difficult to conduct yourself with integrity. And his professional future is hanging, if you will, on a thread. We ought to consider what is just to him. He deserves this post. He has worked hard for it. His qualifications qualify him for the post. We should at least give him a vote.

That is why the newspapers and the opinion of this country for the last week or so have been decidedly in favor, if not of Mr. Estrada and I think most of the opinion of the country has indeed be in favor of confirming him for the reasons I have indicated—but at least in favor of giving him a vote.

I am not going to read all of the editorials, certainly. I ask unanimous consent to have printed in the RECORD an editorial of February 7, 2003, from the St. Louis Post-Dispatch, one my hometown newspapers, and also a letter—they may already be in the RECORD—and one in the New York Daily News by Gov. George Pataki.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

[From the New York Daily News, Feb. 17, 2003]

THE SENATE SHOULD CONFIRM ESTRADA

(By Gov. George E. Pataki)

Miguel Estrada, President Bush's nominee for the District of Columbia Circuit Court of Appeals, is a New York success story—the embodiment of all that has made our state a beacon of freedom and opportunity around the globe.

His life is an inspiration to us all, especially to the children of new immigrants. Yet his nomination has gotten caught up in the all-too-familiar Washington game of partisan politics. That's wrong. When the Senate returns from its break, it should act quickly to end this senseless bickering.

Born in Tegucigalpa, Honduras, Estrada came to the U.S. in 1978. Just 17, he could barely speak English. He proved to be a quick study. Just five years later, he graduated with honors from Columbia University.

After a three-year stint at Harvard Law School, where he served as editor of the prestigious Harvard Law Review, Estrada came home to New York to clerk for a federal appellate judge, Amalya Kearse, who was appointed by Democratic President Jimmy Carter.

After a clerkship with the Supreme Court—one of the highest honors a young lawyer can receive—Estrada spent three years as a federal prosecutor in New York City. He argued numerous cases before appellate courts and 15 cases before the Supreme Court. No wonder the American Bar Association gave him its highest rating: well-qualified.

Estrada's compelling life story and superlative qualifications explain why his nomination has elicited such broad support. No fewer than 18 Hispanic organizations and countless individuals have called on the Senate to confirm him. Herman Badillo, a former Democratic congressman from New York, calls him ''a role model, not just for Hispanics, but for all immigrants and their children.''

The League of United Latin American Citizens calls Estrada ''one of the rising stars in the Hispanic community and a role model for our youth.'' And the U.S. Hispanic Chamber of Commerce calls his nomination a ''historic event.''

Estrada's nomination is equally popular among Democrats. Former vice President Al Gore's chief of staff testifies that he is ''a person of outstanding character and tremendous intellect'' with an ''incredible record of achievement.'' Former President Bill Clinton's solicitor general describes Estrada as ''a model of professionalism and competence.''

The support for Estrada is as deep as it is wide. Yet some Democrats in the Senate are filibustering his nomination—talking it to death and refusing to let their colleagues vote. That's just wrong. In fact, in the two centuries since our nation was founded, that has never happened to a nominee for the federal appellate courts.

Simply put, the Senate should do its job, put aside partisan politics and vote on Estrada's nomination. It's just common sense—but unfortunately, common sense all too often gets shoved aside by party politics in Washington.

Here in New York, we know that now more than ever we must put aside partisan differences and work together for the best interests of all New Yorkers. We also know that the efforts of new immigrants or their children who, through hard work, achieved the American dream—New Yorkers like Badillo, Secretary of State Powell and Estrada—must be rewarded and emulated, not held hostage to party politics.

Estrada has reached the pinnacle of his profession and is a credit to the people of New York. When the Senate finally confirms him, I have every confidence he likewise will prove a credit to America's judicial system.

[From the Washington Post, Feb. 18, 2003]

JUST VOTE

The Senate has recessed without voting on the nomination of Miguel Estrada to the U.S. Court of Appeals for the D.C. Circuit. Because of a Democratic filibuster, it spent much of the week debating Mr. Estrada, and, at least for now, enough Democrats are holding together to prevent the full Senate from acting. The arguments against Mr. Estrada's confirmation range from the unpersuasive to the offensive. He lacks judicial experience, his critics say—though only three current members of the court had been judges before their nominations. He is too young—though he is about the same age as Judge Harry T. Edwards was when he was appointed and several years older than Kenneth W. Starr was when he was nominated. Mr. Estrada stonewalled the Judiciary Committee by refusing to answer questions—though his answers were similar in nature to those of previous nominees, including many nominated by Democratic presidents. The administration refused to turn over his Justice Department memos—though no reasonable Congress ought to be seeking such materials, as a letter from all living former solicitors general attests. He is not a real Hispanic and, by the way, he was nominated only *because* he is Hispanic—two arguments as repugnant as they are incoherent. Underlying it all is the fact that Democrats don't want to put a conservative on the court.

Laurence H. Silberman, a senior judge on the court to which Mr. Estrada aspires to serve, recently observed that under the current standards being applied by the Senate, not one of his colleagues could predictably secure confirmation. He's right. To be sure, Republicans missed few opportunities to play politics with President Clinton's nominees. But the Estrada filibuster is a step beyond even those deplorable games. For Democrats demand, as a condition of a vote, answers to questions that no nominee should be forced to address—and that nominees have not previously been forced to address. If Mr. Estrada cannot get a vote, there will be no reason for Republicans to allow the next David S. Tatel—a distinguished liberal member of the court—to get one when a Democrat someday again picks judges. Yet the D.C. Circuit—and all courts, for that matter—would be all the poorer were it composed entirely of people whose views challenged nobody.

Nor is the problem just Mr. Estrada. John G. Roberts Jr., Mr. Bush's other nominee to the D.C. Circuit, has been waiting nearly two years for a Judiciary Committee vote. Nobody has raised to substantial argument against him. Indeed, Mr. Roberts is among the most highly regarded appellate lawyers in the city. Yet on Thursday, Democrats invoked a procedural rule to block a committee vote anyway-just for good measure. It's long past time to stop these games and vote.

[From the St. Louis Post-Dispatch, Feb. 7, 2003]

A FILIBUSTER IS NOT A FIX

The process for appointing federal judges is badly broken. A filibuster won't fix it.

Democrats are trying to decide whether to filibuster the nomination of Miguel Estrada to the powerful federal appeals court for the District of Columbia. They consider Mr. Estrada a stealth conservative who is being groomed for the U.S. Supreme Court as a Hispanic Clarence Thomas.

The Democrats' fear may turn out to be valid. But the filibuster is the parliamentary equivalent of declaring war. Instead of declaring war, the Democrats should sue for peace and try and to fix the process.

The Senate's confirmation process is not supposed to be a rubber stamp. Judicial nominees have been defeated for political reasons—often good political reasons. The Supreme Court is a better place without Clement Haynsworth, Harrold Carswell and Robert Bork. But ever since Mr. Bork, the process of advise and consent has become attack and delay.

During Bill Clinton's presidency, the GOP-controlled Senate held up highly qualified nominees for ideological reasons. Then, during the two years of Democratic control, the Senate held up highly qualified nominees from President George W. Bush. Now the Republicans are ramming through judges as fast as McDonald's sling burgers.

The only consistent principle in this recent Senate history is that turnabout is fair play. That's a poor way to choose judges.

Mr. Bush, like Ronald Reagan, considers conservative ideology a key qualification for judgeship. Unfortunately, Senate Democrats have set upon highly qualified nominees—such as Michael McConnell, a brilliant law professor, who was eventually confirmed—as wolfishly as they have upon weaker nominees, such as Charles Pickering.

In an ideal world, Mr. Bush would realize that the lackluster Mr. Pickering, a friend of Sen. Trent Lott, R–Miss., raises divisive racial questions. In an ideal world, the president would nominate the best-qualified legal minds, not ideologies.

But in the real world, Mr. Pickering is acceptable and Mr. Estrada is well-qualified. Mr. Estrada is an immigrant from Honduras who went to Harvard Law School, clerked on the Supreme Court and worked in the Solicitor General's office. Democrats, frustrated by the absence of a paper trail, and Mr. Estrada's sometimes-evasive answers on issues such as abortion, tried to get legal memos that Mr. Estrada wrote while in the Solicitor General's office. But both Democratic and Republican solicitors general have urged that the memos be kept private so that future solicitors general receive candid views from their staff.

In short, the Democratic position doesn't justify a filibuster. Instead, Democrats should reach out to Republicans and try to develop a bipartisan truce that gives judges prompt, but thorough, hearings that will speed the important process of filling the many vacancies on the federal bench.

Mr. TALENT. Mr. President, I want to read an editorial from the February 18 issue of the Washington Post. It sums up the case better than or as well as I can:

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We all know a filibuster is underway here, an obstruction tactic.

That is not from the editorial. That was my editorial comment.

The arguments against Mr. Estrada's confirmation range from the unpersuasive to the offensive. He lacks judicial experience, his critics say—though only three current members of the court had been judges before their nominations. He is too young—though he is about the same age as Judge Harry T. Edwards was when he was appointed and several years older than Kenneth W. Starr was when he was nominated. Mr. Estrada stonewalled the Judiciary Committee by refusing to answer questions—though his answers were similar in nature to those of previous nominees, including many nominated by Democratic presidents. The administration refused to turn over his Justice Department memos—though no reasonable Congress ought to be seeking such material, as a letter from all living former solicitors general attests. He is not a real Hispanic and, by the way, he was nominated only because he is Hispanic—two arguments as repugnant as they are incoherent. Underlying it all is the fact that Democrats don't want to put a conservative on the court.

Laurence H. Silberman, a senior judge on the court to which Mr. Estrada aspires to serve, recently observed that under the current standards being applied by the Senate . . .

I ask you to listen carefully to this. . . . being applied by the Senate, not one of his colleagues could predictably secure confirmation. He's right. To be sure, Republicans missed few opportunities to play politics with President Clinton's nominees. But the Estrada filibuster is a step beyond even those deplorable games. For Democrats demand, as a condition of a vote, answers to questions that no nominee should be forced to address—and that nominees have not previously been forced to address. If Mr. Estrada cannot get a vote, there will be no reason for Republicans to allow the next David S. Tatel—a distinguished liberal member of the court—to get one when a Democrat someday again picks judges. Yet the D.C. Circuit—and all courts, for that matter—would be all the poorer were it composed entirely of people whose views challenged nobody.

Nor is the problem just Mr. Estrada. John G. Roberts Jr., Mr. Bush's other nominee to the D.C. Circuit, has been waiting nearly two years for a Judiciary Committee vote. Nobody has raised a substantial argument against him. Indeed, Mr. Roberts is among the most highly regarded appellate lawyers in the city. Yet on Thursday, Democrats invoked a procedural rule to block a committee vote anyway—just for good measure. It's long past time to stop these games and vote.

I ask my colleagues to consider carefully—and I know there have been abuses of this process on both sides of the aisle—but I ask my colleagues to consider carefully whether, in the name of the Constitution, in the name of the obligation of this Senate to go on to other things and resolve them, in the name of comity and the traditions of this body, the Washington Post isn't right, and whether it isn't long past time to stop these games and vote.

I yield the floor.

The PRESIDING OFFICER. The Senator from Illinois.

Mr. DURBIN. Mr. President, first, let me respond to my colleague and friend from the State of Missouri which adjoins my home State of Illinois.

I say to him, I do not disagree with many of the things he said. This debate over Miguel Estrada should not be about the person. I have met him. I sat down in my office with him. He has a very impressive life story to tell having come to the United States as an immigrant when he was about 17 years old, with a limited command of English. The man had some extraordinary achievements. He went on to become the editor of the Law Review at Harvard, served as a member of the Department of Justice, worked at the Supreme Court as a clerk. He is with a major, prestigious law firm. You would really be hard pressed to find anything in his background that is anything short of impressive. That is not the issue.

The fact that he is Hispanic, I say to my friend from Missouri, in my mind, is a plus in many respects. It certainly is not a minus. I was honored to name a Hispanic to the district court in Chicago when I had that opportunity a few years ago. I believe our judiciary should reflect the diversity of the United States. And if this is an example of affirmative action by the White House to put a Hispanic on the DC Circuit court, I say: Three cheers. I think it is the right thing to do.

It has nothing to do with his Hispanic heritage. As I said, that is a plus. There is nothing negative about that in any respect. What is at issue, and the reason the Senate has been tied up with this nomination, is the fact that Mr. Estrada has not been forthright in explaining who he is in terms of what he believes. And that is a fair question.

If we are going to give someone a lifetime appointment to the DC Circuit court—which is not just another court for the District of Columbia, but a major court in our Federal judicial system—I think it is not only reasonable, it is imperative that the Senate ask basic questions of Mr. Estrada. And we did. Time and time again, he stopped short of answering because that is now the drill at the Department of Justice.

The nominees go through this very rigorous training about how to handle a Senate judicial hearing. I am told they have videotapes and play them back and they ask them the questions most often asked of nominees. They school them in the answers to give to not reveal, at any point, what they really think, trying to get away with saying as little as possible, trying to get through the hearing with a smile on their face and their family behind them, and trying to get through the Senate without any controversy.

There is nothing wrong with that if a person has a history that you can turn to and say, well, this man or this woman has been on the bench for so many years and has handed down so many opinions. And we have read them. We know what they believe. They have expressed themselves over and over again. Or if they have published law journal articles, for example, that explain their point of view, that is all there for the record. You could draw your own conclusions.

But in the case of Mr. Estrada, none of that is there. He has not done that much in terms of publications nor involvement in cases. We said to him: Help us understand you. If you will not answer the question directly, let us at least look at the legal documents you prepared so we can see how you analyzed the law.

That has been done before. Other nominees have offered that information. Mr. Estrada said: I would be happy to share it with you as well. But the Department of Justice stepped in and the White House stepped in and said: No, we will not let the Senate see what Mr. Estrada has written as an attorney.

Why? Why would they want to conceal this information, unless, in fact, there is something very controversial and worrisome.

So we come here today not with any personal animus against Miguel Estrada. To the contrary, on a personal basis, he is a very extraordinary individual personally, academically, and professionally. But we have a right to ask these questions. Let me restate that. We have a responsibility to ask those questions, to make certain that each man and woman headed for this awesome lifetime appointment, this awesome position of responsibility, really is the person we want in that position.

Now, make no mistake, with President Bush in the White House, the nominees are more than likely to be Republican, more than likely to be conservative, more than likely to be members—proud members—of the Federalist Society. I know that. That is the nature of this process, the nature of politics. Yet it is still our responsibility to make certain they are just conservative and not extreme in their positions. We cannot draw that conclusion on Miguel Estrada because he has carefully concealed what he really believes. And that is why we are here.

So as a result of focusing on this nomination for 3 straight weeks, we have ignored so many other issues that should be brought to the Senate. We could resolve this issue tomorrow morning easily.

Senator BENNETT, a Republican, of Utah has come to the floor and made a suggestion that I think is eminently reasonable. Let Miguel Estrada turn over his legal writings so they can be reviewed by Senator HATCH and Senator LEAHY. And if they find anything in there of moment, of consequence, or of controversy, let them follow through with the questions or, if necessary, a hearing, and let's be done with it, a vote up or down.

Senator DASCHLE came to the floor today, the Democratic leader, and said that would be perfectly acceptable. We would have the information, and then we could reach our conclusion. And in the process we could be protecting our responsibility as Members of the Senate.

It has nothing to do with Miguel Estrada personally, but it does have something to do with our constitutional authority and responsibility to review each nominee.

EPHEDRA

Mr. President, I would also like to address another issue that is totally unrelated.

On February 14, a Friday, I stood in this spot and spoke about an issue, one that has been on my mind for almost 6 months, an issue which worries me, concerns me, because it relates to the health and safety of American families.

On that day, I challenged the Secretary of Health and Human Services, Tommy Thompson, under his authority to protect American families, to protect them against a nutritional supplement known as ephedra. You will find this supplement in a lot of diet pills, pills that are being sold over the counter as a supplement or vitamin or food product. They are sold as a way to lose weight or increase your energy or performance.

People come in and buy them, with no restriction on how old you have to be or what your health is or what might interact with these supplements. And people buy those and find out, in many instances, that not only don't they work, they are dangerous.

I have challenged Secretary Thompson for 6 months—6 months—to take these dangerous products off the market, and he has not done so. That was February 14.

On February 16, a pitcher from the Baltimore Orioles dropped dead during training. He had cardiac arrest, and the coroner who examined his body afterwards—those who did the autopsy—disclosed the fact that he had used these supplements with ephedra. That was 2 days after I had given that speech.

Time has run out for Steve Bechler and for many like him when it comes to protection from the harm of dangerous dietary supplements containing ephedra. We cannot bring Steve Bechler or my own constituent in Lincoln, IL, Sean Riggins, back. But we can fight to make sure this dangerous product is taken off the market immediately.

Sean Riggins was a 16-year-old boy. And about 4 weeks after I held a hearing in Washington, he went into a convenience store in Lincoln, IL, a small town, and bought—off the counter, with no identification, no check—a pill that was supposed to help him to perform better as a football player. The pill had ephedra in it. As best we can determine, Sean Riggins—this healthy football player, 16 years old—washed down that pill with Mountain Dew or some other product with caffeine in it and went into cardiac arrest and died. This healthy young man died, after taking a pill sold over the counter that contained ephedra.

I cannot think of another product that has generated so many adverse events, so many bad results—some extremely serious, even fatal—and yet has failed to generate any response from this Government to protect families and individuals buying these products.

The Food and Drug Administration has received over 18,000 reports of adverse events, serious health consequences, from those using ephedra and within those 18,000 over 100 deaths. Yet the Food and Drug Administration and Secretary Thompson refuse to act. They want to study the issue. And as they study, innocent people die.

Last August, I wrote to Secretary Thompson and urged him to ban these products. At that time, Lee Smith, an airline pilot from Nevada, had not yet suffered the debilitating stroke that cost him his health and his job due to ephedra.

I again wrote to Secretary Thompson on August 22. At that time, when I sent him a letter begging him to do something about these products, my constituent, Sean Riggins—that healthy 16-year-old boy in Lincoln, IL, who played football and wrestled for his high school team—was still alive. He died September 3, after consuming an ephedra product called yellow jacket. You will find those by cash registers at gas stations and convenience stores across America—kids popping them because they think they make them better performers when it comes to sports or, even worse, taking these pills and drinking beer, craziness that leads to terrible health consequences. And those pills are sold over the counter, with no Government control.

I wrote again, and I spoke directly to Secretary Tommy Thompson in September and October. My Governmental Affairs Subcommittee had hearings on the dangers of ephedra in July and October.

I again urged the Secretary, in a letter sent to him less than 1 month before Steve Bechler of the Baltimore Orioles died. Incidentally, did you see the followup articles in the sports pages, as other athletes, professional baseball players such as David Wells came forward and told his story about how he wanted to lose some weight, and he took an ephedra product and his heart was racing at 200 beats a minute. He flat-lined. He was almost in cardiac arrest before they finally brought him back.

These are not sickly individuals. These are healthy athletes who are taking these products sold over the counter and risking their lives in the process.

Yet the most we can get from Secretary Thompson in response is a suggestion that maybe we need a warning label. When the reporters asked him this past weekend about Steve Bechler of the Baltimore Orioles, his death because of ephedra, the Secretary was quoted as saying: ''I wouldn't use it, would you?''

Well, I must say to the Secretary, this is not a matter of his personal preference. It is not a matter of whether as a consumer he would buy the product. It is a matter of his personal responsibility, his responsibility as Secretary of Health and Human Services to get this dangerous product off the shelves of American stores today and to protect families.

I am not the only person calling for this ban on ephedra products. The American Medical Association, representing over 200,000 doctors, called on Secretary Thompson to ban ephedra products. They didn't do it last week after Steve Bechler died. No. They did it over a year ago after Canada had banned this product for sale in their country. They went to Secretary Thompson and said it is dangerous to sell in the United States. He has done nothing.

Let me tell you another thing you might not know. The U.S. Army has banned the sale of ephedra in their commissaries worldwide after 33

ephedra-related deaths occurred among American servicemen. Does this make any sense? We believe as a government that we need to protect the men and women in uniform and so we ban the sale of these products at commissaries across the world, and yet the Secretary of Health and Human Services and the Commissioner of the Food and Drug Administration will not ban the sale of these products in convenience stores and drugstores and gas stations across America.

When you ask him about it, the Secretary says: I am studying it. I have a group called the RAND Commission that is going to study it.

With all due respect, we don't need another study. The Food and Drug Administration has received over 18,000 adverse reports about ephedra. The FDA could do followup on the most serious ones. In fact, the FDA did commission a review of adverse reports several years ago. That review by Drs. Haller and Benowitz established that 31 percent of the reports were definitely or probably related to ephedra and an additional 31 were deemed to be possibly related.

We understand what we are up against. Ephedra is a danger. It is so dangerous that when it was used in its synthetic form with caffeine, that was banned over 15 years ago. They said you couldn't sell a drug in America, nor could you sell an over-the-counter drug product in America that contained ephedra and caffeine because, put together, it is a dangerous and sometimes lethal combination. But yet if you step back from the over-the-counter drugs and call it a nutrition supplement, a vitamin, a food, you are totally exempt from that prohibition. You can combine those two lethal substances, ephedra and caffeine, and sell them with impunity. Does that make any sense? Is that protecting consumers across America? Is that what you expect from your government?

Certainly it is not what I expect. Many of these companies say it is a natural product. Ephedra is naturally occurring. That is no defense. Arsenic is a natural product. Hemlock is a natural product. That doesn't mean that they are safe. In fact, they are dangerous.

We have seen a lot of studies that have come out about ephedra. We know what needs to be done. Many States have already taken action. Because the Federal Government has failed to act, over 20 States have enacted restrictions on the sale of ephedra-containing products.

Incidentally, if you think these products are something you have never heard of, the leading sales of ephedra products are under the brand name Metabolife 365. You have seen them advertised on television and in magazines. Every time you walk into a drugstore and convenience store, you find: Metabolife tablets help you lose weight. Look carefully. Many of them contain ephedra, this lethal drug which has killed so many people.

Suffolk County, a week or so ago in New York, decided to ban this product as well after a 20-year-old named Peter Schlendorf died in 1996, and others suffered serious consequences. They understood, as the U.S. Army, Canada, Britain, Australia, and Germany, that action had to be taken to protect the residents. The National Football League, the NCAA, and the International Olympic Commission have reached the same conclusion, banning the use of this product by athletes.

I wrote to the Baseball Commissioner, Bud Selig, last week and to the Baseball Players' Association urging them to follow suit. The question isn't whether these individual organizations will show responsibility. The question is whether this Government will accept its responsibility.

I don't know Secretary Thompson that well. I have met him a few times. He is a very likable person. He certainly has had a distinguished public career in the State of Wisconsin, serving as a legislator and Governor of the State for many years, one of the most popular elected officials in its history. Everyone tells me this man really understands public service. I believe it.

This really seems to be a blind spot. When I talked to Secretary Thompson on the phone about these products, he said: How are we going to stop these fellows from selling these products and endangering people? I said: Mr. Secretary, you can stop them. You have the authority to stop them.

Time passes and nothing happens. I understand this industry is powerful. I have heard from them. I have heard from my colleagues in the Senate and House who have said: Don't take on these folks in the vitamin and nutritional supplement industry. They really have a lot of political clout. They do. But for goodness' sakes, if you can't stand up to an industry that is selling a lethal product to protect American families, why in the world would you take the oath of office to serve in the Senate? I think every Member understands that responsibility. It goes beyond political fear. It goes right to the heart of your political responsibility, the oath of office we all take and one we all value so much.

In closing, I say to Secretary Thompson, you have another chance now. It is a chance which I pray you will take. The last time I made a speech on the floor of the Senate about this issue, Steve Bechler of the Baltimore Orioles, a man in his early twenties, a promising athlete with a great future ahead of him, was still alive. Sadly, he is not alive today. He took this product and he died as a result. Others will, too.

That story, that tragic story of Steve Bechler, Sean Riggins, and so many others will be repeated over and over again. This industry may have political clout, but it does not have a conscience. It is up to the Secretary, as head of the Health and Human Services Department, to accept his responsibility to protect American families. A warning label is not enough. You cannot get by with putting a label on this product, saying: Caution, use of this product may cause stroke, a coronary event, or death. Why in the world would you allow such a product to be sold over the counter, unregulated in terms of the age of the buyer, unregulated in terms of the dosage? How in the world can you justify that kind of a thing?

The Secretary needs to accept his responsibility, and if he does, I will be the first to applaud him. But until he does, stay tuned. You will continue to hear these speeches on the floor from me and others while helpless victims across America fall because of their consumption of this deadly product.

Mr. REID. Will the Senator yield for a question?

Mr. DURBIN. I am happy to yield.

Mr. REID. As the Senator knows, the Senate has been tied up in the matter of Miguel Estrada for 9 or 10 days. From what the Senator said, I don't know much about the product, but he has made a very persuasive argument. It seems to me if the administration and the Secretary, as part of the administration, refuses to do anything administratively, maybe we could well use some Senate time debating this issue. Maybe there should be a moratorium put on the sale of this until further information is obtained on it. I make that suggestion.

My direct question, if the Secretary refuses to do something forthwith, wouldn't we well use the time that is now being spent on this nomination talking about this product that has killed people as the Senator has related?

Mr. DURBIN. The Senator is absolutely right. In fact, we not only could, we should. We should accept that responsibility. We do have this Government which has three coequal branches. If the executive branch and Secretary Thompson refuses to use the authority he has under the law, frankly, I think we should ban the sale of this product in the U.S.

As the Senator knows, we have been tied up for 3 weeks because Miguel Estrada refuses to disclose legal writings he has made. Even Republican Senators have suggested that he should.

We have waited for Republicans to understand that with more information, we can put this behind us and move on to other important business—not just questions about health and safety, but questions about the economy of this Nation, issues on which we ought to be debating and acting.

In closing, I am just going to ask Secretary Thompson again to take this very seriously. I hope we don't have to read about more athletes and other unsuspecting individuals and children who lose their lives as a result of these dangerous products. I say to any citizens following this debate, please think twice before you use a product containing ephedra. There are too many

cases of death and serious health consequences for people who thought they were taking an innocent little pill that can be sold over the counter at a convenience store. In fact, many have turned out to be lethal doses that have killed or caused a great deal of harm.

I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. TALENT. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. NELSON of Florida. Mr. President, the courts provide the foundation upon which the institutions of government in our free society are built. Their strength and legitimacy are derived from a long tradition of Federal judges whose knowledge, integrity and impartiality are beyond reproach.

The Senate is obligated by the Constitution—and the public interest—to protect this legacy and to ensure that the public's confidence in the court system is justified and continues for many years to come.

As guardians of this trust we must carefully scrutinize the credentials and qualifications of every man and woman nominated by the President to serve on the Federal bench.

The men and women we approve for these lifetime appointments make important decisions each and every day, which impact the American people. Once on the bench they may be called upon to consider the extent of our right to personal privacy, our right to free speech, or even a criminal defendant's right to counsel. The importance of these positions and their influence must not be dismissed.

We all have benefitted from listening to the debate about Miguel Estrada's qualifications to serve on the D.C. Circuit.

I very much respect those Senators who desire to have additional information about Mr. Estrada's personal beliefs. Their efforts reflect a sound commitment to the Senate's constitutional obligation to advise and consent.

At the same time, I am troubled by those who have suggested that some Senators are anti-Hispanic because they seek additional information about this nominee. Poisoning the debate with baseless accusations demeans the nomination process.

After reviewing Mr. Estrada's personal and professional credentials—including personally interviewing the nominee—I believe he is qualified to serve on the D.C. Circuit Court—and, I will vote in favor of his nomination.

A Federal appellate judge's power to decide and pronounce judgment and carry it into effect is immense and comes with a moral and legal obligation to conform to the highest standards of conduct.

Federal judges must possess a high degree of knowledge of established legal principles and procedures and must also be impartial, even tempered and have a well-defined sense of justice, compassion and fair play.

In addition, a judge must have the integrity to leave legislating to lawmakers. Judges must have the self-restraint to avoid injecting their own personal views or ideas that may be inconsistent with existing decisional or statutory law.

I believe Mr. Estrada possesses the knowledge and skills needed to be a successful court of appeals judge. Few would argue with his academic credentials, litigation experience or intelligence.

And based on my conversation with him, and those who know him well, I believe he respects—and will honor—his moral and legal obligation to uphold the law impartially.

However, should Mr. Estrada someday be considered for a position on the Supreme Court—as some have suggested he could be—I believe further inquiry not only will be justified, but necessary.

While appellate judges are constrained to a great degree by precedent, and by a check on their power by the Supreme Court, justices on the High Court have greater latitude to insert their own ideological viewpoints.

Mr. Estrada agreed wholeheartedly with this point when we discussed his nomination.

Make no mistake; I believe all judicial nominees should be completely forthcoming during the confirmation process.

Mr. Estrada has argued that he's satisfied a minimum threshold of disclosure, and that revealing additional information about his personal ideological beliefs may compromise his image of impartiality—if he eventually is seated on the federal bench.

I disagree with his approach, because it leads to the suspicion and mistrust—like that which now engulfs us.

Furthermore, I do not believe a similar argument reasonably can be made by a nominee to the Supreme Court. Ideology can be central to the High Court's decisions. As a result, absolute disclosure by Supreme Court nominees is necessary to protect the public interest.

In sum, while I believe Mr. Estrada could have been more forthcoming in order to avoid this controversy, my conclusion is that he is qualified to serve on the D.C. Circuit.

Should he come before the Senate as a nominee to the Supreme Court, he must be willing to provide additional information about his personal beliefs.

LEGISLATIVE SESSION

Mr. TALENT. Mr. President, I ask unanimous consent that the Senate return to legislative session.

The PRESIDING OFFICER. Without objection, it is so ordered.

MORNING BUSINESS

Mr. TALENT. Mr. President, I ask unanimous consent that the Senate proceed to a period for morning business.

The PRESIDING OFFICER. Without objection, it is so ordered.

HONORING MAJOR GENERAL PHILIP G. KILLEY FOR 40 YEARS OF SERVICE

Mr. DASCHLE. Mr. President, today I salute a great American and South Dakotan, Major General Philip G. Killey.

General Killey, currently the Adjutant General of the South Dakota National Guard, retires at the end of this week, after 40 years of service. His service includes nearly a quarter-century with the South Dakota National Guard, including two separate appointments as Adjutant General covering more than 6 years.

Since September 11, 2001, General Killey's job has become more demanding and complex, but, as ever through his career, he has proven worthy of the challenge. Since September 11, his troops have been performing a broad variety of missions, from bolstering security at our State's airports to enforcing the no-fly zone over Iraq, from fighting forest fires to keeping the peace in Bosnia. All this, while also staying trained and ready for their next assignment.

Now, that next assignment is here. About 1,200 South Dakota Guard personnel have been called to active duty as part of our Nation's buildup on the borders of Iraq. Given the small population of our State, this is a major contribution. In fact, on a per capita basis, South Dakota is contributing more Guard personnel than all but five other States. This is a much larger commitment than the South Dakota Guard was asked to provide during Desert Storm, its other major call-up of the post-Cold War period, and it has come at a time when General Killey is already managing other high-priority commitments.

Managing these tasks and the Iraq call-up turns out to be the capstone event of General Killey's long military career, and it stands as a real testament to his skill and leadership. It is at critical moments like this, when your resources are stretched thin and you are asked to do even more, that gaps in training, leadership or equipment will reveal themselves. But in South Dakota, General Killey's troops have met the test. They are ready, and it shows.

Over the years, General Killey and I have worked together on many fronts to improve the equipment and facilities of the Guard. In the past 2 years, we have been able to secure nearly $35 million in construction funds to improve 7 Guard facilities at Camp Rapid, Fort Meade, Pierre, Watertown, Mitchell, and Sioux Falls. We were able to